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No. 2276

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ALASKA STEAMSHIP COMPANY, a Corporation,  
Claimant of the Steamship "ALAMEDA,"  
Her Engines, Boilers, Tackle, Apparel and  
Furniture,

Appellant,

vs.

THE INLAND NAVIGATION COMPANY, a Cor-  
poration,

Appellee.

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Apostles on Appeal.

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Upon Appeal from the United States District Court for  
the Western District of Washington, Northern Division.

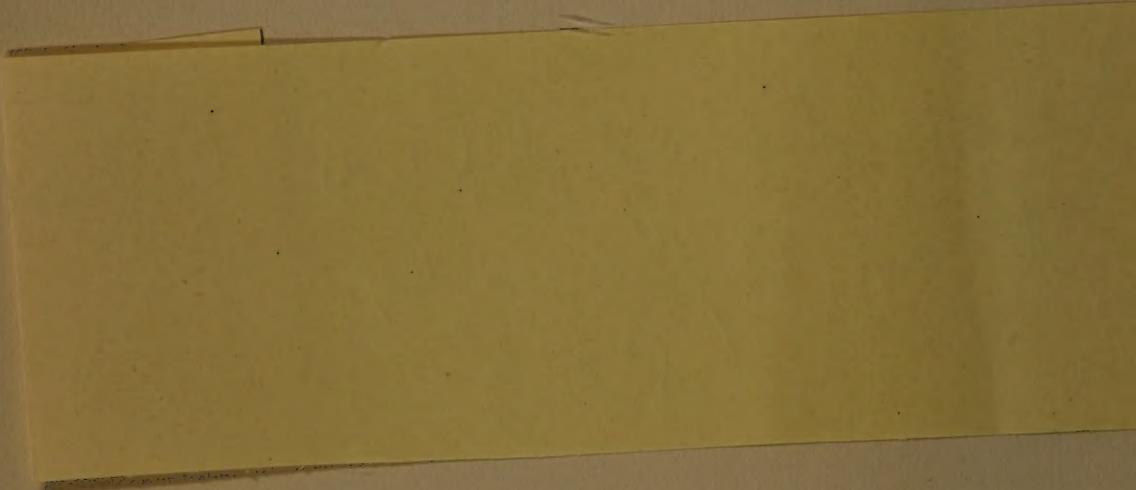
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JUL 31 1913



Records of U.S. Circuit  
Court of Appeals

823



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court, Western District of Washington, Northern Division,*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,  
Claimant.

**Names and Addresses of Counsel.**

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Seattle, Washington.

LAWRENCE BOGLE, Esquire, 609–616 Central  
Building, Seattle, Washington.

Proctors for Claimant and Appellant.

IRA BRONSON, Esquire, 614 Colman Building,  
Seattle, Washington.

Proctor for Libelant and Appellee. [1\*]

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\*Page-number appearing at foot of page of original certified Record.

*In the United States District Court, Western District of Washington, Northern Division.*

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The Steamship “ALAMEDA,” Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,  
Claimant.

**Statement.**

**TIME OF COMMENCEMENT OF SUIT.**

May 11, 1912.

**NAMES OF PARTIES.**

Inland Navigation Company, a Corporation, Libelant.

Alaska Steamship Company, a Corporation, Claimant.

**DATES WHEN PLEADINGS WERE FILED.**

Libel—May 11, 1912.

Answer to Libel—July 1, 1912.

**ISSUANCE OF PROCESS AND SERVICE  
THEREOF.**

The libel herein was filed in the above-entitled court on May 11, 1912. Prior thereto, the Alaska Steamship Company, owner and claimant of the steamship “Alameda” had duly filed in the office of the Clerk of said court a bond conditioned to answer the decree

of said court in any and all cases that might thereafter be brought in said court against any of its vessels, which bond [2] had been duly approved by the Judge of said court and recorded as provided by Admiralty Rule No. 32 of said court.

On the filing of said libel and on, to wit, said May 11, 1912, said libelant caused due notice of the filing of said libel, and of the claim therein, to be served upon said Alaska Steamship Company, and upon the American Surety Company of New York, the surety on said general bond, pursuant to Admiralty Rule No. 33 of said court, which notice was given in lieu of the issuance of a monition and the seizure of said steamship "Alameda."

#### REFERENCE TO COMMISSIONER.

On June 10, 1912, the said Court duly made and filed an order of reference in said cause to A. C. Bowman, United States Commissioner, to take and report the testimony in said cause, and on February 10, 1913, said Commissioner duly returned the testimony taken before him in said cause into court and the same was on said day filed in the office of the Clerk thereof. Theretofore there had been taken in said cause, pursuant to stipulation therein between the said parties, certain depositions, which had also been duly returned and filed in said court.

#### TRIAL.

On February 10, 1913, said cause came duly on for trial and hearing before Honorable Clinton W. Howard, one of the Judges of said court, upon the testimony so taken before said Commissioner and returned and filed in court, together with the exhibits

4           *Alaska Steamship Company vs.*

offered in evidence by the respective parties, which were also returned by said Commissioner and filed in said court, and the depositions theretofore taken and filed in said cause. Proctors for the respective parties appeared and argued said cause in open court, and thereafter submitted written briefs to said Court. Thereafter, and on March 1, 1913, said Judge, before whom said cause was tried and heard, duly filed his memorandum decision on the merits in said cause.

[3]

#### DECREE.

Final decree in accordance with such memorandum decision on the merits was filed March 3, 1913, which decree was duly signed by the said Judge before whom said cause was heard and tried.

#### NOTICE OF APPEAL.

Notice of appeal, also petition for appeal, were filed May 10, 1913, and an order allowing such appeal made and filed on the same day. [4]

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*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 2152.

THE INLAND NAVIGATION COMPANY, a  
Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,  
Respondent.

**Libel.**

To the Honorable C. H. HANFORD, Judge of the District Court of the United States for the Western District of Washington, Northern Division.

The libel and complaint of The Inland Navigation Company, a corporation organized, created and existing under and by virtue of the laws of the State of Oregon, against the steamship "Alameda," her engines, boilers, tackle, apparel and furniture, and against all persons lawfully intervening for their interest in the same, in a cause of collision, civil and maritime, alleges as follows:

**I.**

That at all the times hereinafter mentioned the above-named libelant was, and ever since has been, and still is, a corporation duly organized, created and existing under and by virtue of the laws of the State of Oregon, and doing business in the State of Washington, and during all of said times was the owner of that certain steamboat known as and called the "Telegraph," together with her engines, boiler, tackle, apparel and furniture, which said vessel was a stern-wheel steamer of about the length of 153.7 feet and of about the beam of 25.7, and of the depth of about 8.0 feet, and of tonnage of 386 gross and 243 net tons, and which said vessel prior to the time of the collision hereinafter mentioned was in all respects well manned, tackled, appareled and appointed, and had the usual and necessary complement of officers and crew; and that said vessel was used and operated by the libelant in the transportation of

freight and passengers upon Puget Sound, and principally between the Port of Seattle and the Port of Everett, thereon. [5]

## II.

That said steamship "Alameda" at the time of the collision hereinafter mentioned was an iron steamship of about the length of 314.0 feet, and of about the breadth of 41.0 feet and of the depth of about 17.3 feet, and of tonnage of 3158 gross and 1939 net tons; and was an American vessel engaged in transporting freight and passengers between the Port of Seattle and various Ports in Southeastern Alaska.

## III.

That on the night of April 25th, 1912, while the said steamer "Telegraph" was lying at her berth, in good safety on the north side of the Colman Dock, in the city of Seattle, King County, Washington, the said steamer "Alameda," through the gross negligence of the crew of her engine-room, and in direct violation of the orders of her master, while said steamship was being navigated from what is known as East Waterway, in the city of Seattle, to a berth alongside of Pier Two in said city of Seattle, was driven at great speed head on against the south side of the Colman Dock in the city of Seattle, and completely through said Colman Dock, and the stem of said steamship "Alameda" was driven into the side of the hull of the said steamship "Telegraph," crushing the same in, and opening a large hole therein, as a result of which, large volumes of water immediately poured into the hull of said steamship "Telegraph," causing her to sink and founder in the

waters of Elliott Bay, and immediately to the northward of said Colman Dock.

IV.

That as the result of said collision, the ramming and sinking of said steamer "Telegraph," she became and was and is a total loss.

V.

That said collision, ramming and sinking of the said steamer "Telegraph" was without any fault, neglect or wrongful act on part of the said steamer "Telegraph" or of any of her officers or crew, but was due wholly to the fault on the part of the said steamer "Alameda," in that her engineer drove her forward at great speed when he had been given orders to reverse his engines slow speed astern.

VI.

That the said steamer "Telegraph," immediately prior to the time of said collision, was of the value of Fifty-five Thousand Dollars, [6] and that as a result of said collision and sinking she became of no value whatever, all to the damage of the libelant in the sum of Fifty-five Thousand (\$55,000.00) Dollars.

VII.

That the steamship "Alameda" is now lying in the Port of Seattle, in the State of Washington, and within the jurisdiction of this Honorable Court.

VIII.

That all and singular the premises are true.

WHEREFORE, libelant prays that process in due form of law and according to the practice of this Honorable Court may issue against the steamship "Alameda," her engines, boiler, tackle, apparel and

furniture, and that she may be condemned and sold to answer for the damages alleged in this libel; and that this Court will hear the evidence which the libellant will adduce in support of the allegations of the libel, and will enter a decree in favor of the libellant for the above-mentioned damages, and will order the same to be paid and satisfied out of the proceeds of said steamship "Alameda," together with interest and costs of the libellant, and will otherwise right and justice administer in the premises.

THE INLAND NAVIGATION COMPANY,

JOSHUA GREEN,

President.

IRA BRONSON,

Proctor for Libellant.

The United States of America,

State of Washington,

County of King,—ss.

On this 10th day of May, 1912, before me, at Seattle, personally appeared Joshua Green, President of the within-named The Inland Navigation Company, and made oath that he had read the foregoing libel, and knows the contents thereof and that the same is true as to his own knowledge, except as to those matters and things stated to be on his own information and belief, *and to those matters and things he believes [7] them to be true.*

JOSHUA GREEN.

Subscribed and sworn to on the last day above mentioned before me.

[Seal]

ROBERT W. REID,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Indorsed: Libel. Filed in the U. S. District Court, Western Dist. of Washington, May 11, 1912. A. W. Engle, Clerk. By S., Deputy. [8]

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[Answer.]

*In the District Court of the United States for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. —.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,  
Claimant.

To the Honorable C. H. HANFORD, Judge of the District Court of the United States, for the Western District of Washington, Northern Division:

The answer of the Alaska Steamship Company, a corporation, claimant of the steamship "Alameda," intervening for its interest in the said steamship "Alameda" to the libel of the Inland Navigation Company, a corporation, on file in the above-entitled proceeding, respectfully admits, denies and alleges as follows:

I.

Alleges that the Alaska Steamship Company is

now, and during all the times herein and in said libel mentioned, was a corporation duly organized, created and existing under and by virtue of the laws of the State of Nevada.

## II.

That the said Alaska Steamship Company, a corporation, was, during all the times in said libel mentioned and ever since has been, and now is the true owner of the said steamship "Alameda," her engines, boilers, tackle, apparel and furniture, and that no [9] other person was or is the owner thereof.

## III.

Answering the allegations of paragraph I of said libel, claimant denies that it has any knowledge or information as to whether the said steamer "Telegraph" was immediately prior to said collision, well-manned, tackled, appareled and appointed; it admits the other allegations of said paragraph.

## IV.

Admits the allegations of paragraph II of said libel.

## V.

Answering paragraph VI, Claimant denies each and every allegation therein contained.

WHEREFORE, claimant prays that this Court will hear evidence as to the value of the said steamer "Telegraph" immediately prior to the time of said collision, and will further hear evidence as to the damage suffered by libellant as a result of the collision and sinking of said vessel, and such other evidence as may be introduced in said cause, and enter its decree accordingly, and will otherwise right and

justice administer in the premises.

BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Claimant. [10]

United States of America,  
State of Washington,  
County of King,—ss.

On this 1st day of July, 1912, before me, at Seattle, personally appeared R. W. Baxter, President of the within-named Alaska Steamship Company, a Corporation, claimant in the above-entitled action, and made oath that he has read the within and foregoing Answer, knows the contents thereof, and believes the same to be true.

R. W. BAXTER.

Subscribed and sworn to before me this 1st day of July, 1912.

[Seal] F. T. MERRITT,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Service of within Answer this 1st day of July, 1912, and receipt of a copy thereof, admitted.

IRA BRONSON,  
Attorney for Libelant.

[Endorsed]: Answer. Filed in the U. S. District Court, Western Dist. of Washington, July 1, 1912.  
A. W. Engle, Clerk. By F. A. Simpkins, Deputy.  
[11]

**[Testimony, etc.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 2152.

THE INLAND NAVIGATION COMPANY,

Libelant,

vs.

Steamship "ALAMEDA," etc.,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

To the Honorable EDWARD E. CUSHMAN, Judge  
of the Above-entitled Court:

Pursuant to the order of reference herein, on this 8th day of August, 1912, the libelant appeared by its officers and by Mr. Ira Bronson, its proctor, and the Claimant appeared by Mr. Merritt, of Bogle, Graves, Merritt & Bogle, its proctors; thereupon the following proceedings were had and testimony offered:

**Libelant's Testimony.****[Testimony of C. D. Scott, for Libelant.]**

C. D. SCOTT, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) Were you connected with the company that owned and built and operated for a while the steamer "Telegraph"? A. Yes, sir.

Q. What connection did you have with the company? A. Secretary and treasurer.

(Testimony of C. D. Scott.)

Q. How many years ago was that, about, so near as you can [12] remember?

A. Two years ago.

Q. That is when you severed your connection with the vessel. When was the vessel built?

A. 1903.

Q. Were you secretary and treasurer of the company then?

A. No, not during the time she was built, but I was probably two years before we sold out.

Q. You were connected with the company at all times? A. Yes, sir.

Q. Do you know what the steamer cost you?

Mr. MERRITT.—I object as incompetent, irrelevant, and immaterial.

Mr. BRONSON.—We offer to prove that and also the value of the "Telegraph" at the time she was lost.

Mr. MERRITT.—I object to that as incompetent, irrelevant and immaterial, and as not proper measure of damages in this case.

Q. Go ahead and state what the vessel cost when she was built.

A. The vessel cost seventy-five thousand dollars.

Q. She cost seventy-five thousand dollars?

A. Yes, sir.

Q. Where was she built?

A. At the Sumner Iron Works at Everett.

Q. Did that include any architect's time or anything of that kind? A. No, sir.

Q. Did it include the time of yourself or your father? A. No, sir. [13]

(Testimony of C. D. Scott.)

Q. Was your time and your father's time devoted to the construction of the vessel?

A. My father's time was devoted to superintending the construction of the vessel, mine was not; all of his time was.

Mr. MERRITT.—I wish it understood that I object to this line of examination.

Mr. BRONSON.—Yes, sir.

Q. Do you know about how long she was building, that is approximately?

A. About five or six months.

Cross-examination.

Q. (Mr. MERRITT.) When you say she was built at Everett, you mean her hull was built there?

A. Yes, sir; the hull and the machinery except the cylinders, was built there.

Q. All the machinery except the cylinders was built there?    A. Yes, sir.

Q. Where did you get the cylinders?

A. We got the cylinders from the O. R. & N. company, at Portland.

Q. You do not know where that company got them?

A. No, I do not know myself; I think they built them.

Q. You did not see them when they were installed in this other vessel?    A. No, sir.

Q. And did not see them when they were used in the other vessel?    A. No. [14]

Q. When you purchased them they were taken out of another vessel?

(Testimony of C. D. Scott.)

A. They were already out; they were shipped up here.

Q. Where was the boiler built?

A. At the Sumner Iron Works.

Q. And after they were built, and when the vessel was constructed, there was an inspection by the Government Inspectors? A. Oh, yes.

Q. And the Government Inspectors refused to pass the boat as she was built by you, didn't they?

A. They refused to pass her on account of the construction of the boilers in some way.

Q. The set-bolts in the boilers were too far apart and did not comply with the regulations?

A. No, it was the crown-sheet; the crown-sheet did not come down far enough or it was too high up, I don't know which.

Q. Is it not a fact that the set-bolts in the boiler or the bolts were too far apart?

A. Yes, that was one reason.

Q. And before the Inspectors would pass her it was necessary to put bands around the boiler, was it not? A. Yes, four or five strips.

Q. Now, this seventy-five thousand dollars the engines after she was built—the compounding of the engines? A. Yes, sir.

Q. And that was done some time after?

A. Yes, that was during the Seattle Fair, the Exposition.

Q. Do you know the cost of the hull? [15]

A. No, I do not.

Q. Do you know the cost of the engines?

(Testimony of C. D. Scott.)

A. No, I do not.

Q. Do you know the cost of the boiler?

A. No, I do not.

Q. Do you know the cost of the furnishings?

A. No.

Q. Do you know the cost of the dynamo and pumps and other things? A. No, sir.

Q. What was your connection with the company?

A. I was secretary and treasurer at the time.

Q. At the time she was built?

A. No, I was not.

Q. What was your connection with the company at that time?

A. Well, I was merely a stockholder at that time, that was all.

Q. What business were you engaged in at that time? A. I was ticket agent.

Q. For whom? A. For our company.

Q. And what boats did your company operate?

A. They had the "City of Everett" and "Telegraph."

Q. You were ticket agent at Everett?

A. No, Seattle.

Q. Spent all your time here? A. Yes, sir.

Q. All you know, then, about the cost of the vessel is what you have been told by others?

A. What I have been told by others and what I could see on the [16] books; they were carrying her at that figure.

Q. You did not keep the books?

A. I kept the books during the last year or so.

Q. I mean at the time the vessel was built?

(Testimony of C. D. Scott.)

A. No, I did not.

Q. Then, I say all you know about the cost of the vessel is what someone told you or what you may have seen on the books.

A. What I seen on the books; yes, sir.

Q. You did not buy these cylinders?

A. No, sir.

Q. Did not see them until after they were in the vessel? A. No, sir—

Q. How long afterwards?

A. Oh, just after they put them in. In fact, I saw them before they were in the boat. I saw them at the yard as they were lying there before they were put in the boat.

Q. What is your age? A. Thirty-seven.

Q. What had been your business before you were ticket agent?

A. Well, sir, that is the first thing I ever did, steamboating.

Q. How long had you been engaged in that business at the time this vessel was built in 1903?

A. Well, I was selling tickets up until we sold out.

Q. I mean prior to that time, prior to 1903?

A. Prior to that, ticket agent.

Q. Ticket agent all the time? A. Yes, sir.

Q. You personally had had no experience in constructing [17] boats? A. No, sir.

#### Redirect Examination.

Q. (Mr. BRONSON.) The books of the company have been destroyed? A. Yes, sir.

(Testimony of C. D. Scott.)

Q. Do you know of your own knowledge, from seeing these cylinders, that they were practically new?

A. Well, no, I do not. It was just what I had been told about them, that is all, I could not tell myself.

Q. Do you know whether your father got them at a less price than if they had been built new?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial.

A. Yes, sir.

Mr. MERRITT.—I move to strike all of the testimony of the witness as incompetent, irrelevant and immaterial and as hearsay evidence.

(Testimony of witness closed). [18]

[**Testimony of Frank Walker, for Libelant.**]

FRANK WALKER, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) What is your profession?

A. Marine surveyor, naval architect and consulting engineer.

Q. Did you know the steamer "Telegraph" before she was rammed and sunk? A. Yes, sir.

Q. Were you familiar with her general dimensions? A. Yes, sir.

Q. And her construction as to hull and machinery? A. Generally.

Q. State how much experience you had had in familiarizing yourself with her.

A. I made a number of surveys of the vessel and examined the vessel at various times, especially last

(Testimony of Frank Walker.)

year during a heavy overhauling.

Q. She was overhauled last year? A. Yes, sir.

Q. Under the direction of yourself in some form or other? A. Under my supervision.

Q. I forgot to ask you how many years' experience you have had in your business or profession.

A. I have been all my life in it.

Q. How old are you?

A. I am forty-six years old.

Q. You were apprenticed, were you?

A. Apprenticed as mechanical engineer and shipbuilder.

Q. In your boyhood? A. Yes, sir. [19]

Q. You have been at it ever since?

A. Ever since.

Q. How long have you resided on Puget Sound?

A. Since 1893, I think it was, that I came to Puget Sound.

Q. Do you know approximately what it would cost to build the steamer "Telegraph" at the present time, as a new vessel, reproducing her both as to dimensions and form and so forth, and also as to speed? A. Yes, sir.

Q. What would it be?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial; not the proper measure of damages in this case. The proper evidence is the value of the vessel at the time of the collision.

A. Seventy-five to eighty thousand dollars.

Q. Would that include the hull, the machinery and boilers, her tackle, apparel and furniture?

(Testimony of Frank Walker.)

A. Including the entire boat ready to go into service.

Q. And architects' fees?

A. That would not include architects' fees.

Q. What is the usual and ordinary and fair charge of architects and supervision for building a boat like the "Telegraph," on Puget Sound?

Mr. MERRITT.—I renew my last objection.

A. Five per cent of the contract price.

Q. Can it be got for less, that is, from a competent architect? A. Not that I am aware of.

Q. Now, do you know what state of preservation, in a general way, I mean, the "Telegraph" was in at the time [20] she was sunk?

A. In a fairly good state of preservation.

Q. As you say you had gone over her and examined her, etc., so that you know? A. Yes, sir.

Q. Do you know whether or not she had had any cylinder work done on her during the last year, replacements or up-keep of any kind? A. Oh, yes.

Q. What was the nature of it?

A. She had, I think, the port side engines entirely renewed, and shortly before that the shaft was renewed.

Q. What condition was she in, generally speaking, was she in bad condition or good condition?

A. Fairly good condition.

Q. Do you know how she was rated for speed as a stern-wheel boat?

Mr. MERRITT.—I renew my former objections.

A. She was a very fast boat.

(Testimony of Frank Walker.)

Q. Do you know about what she was capable of making?

A. She was capable of making about 17 knots, or about twenty statute miles.

Q. Is that about as fast as any stern-wheel boat is able to go? A. As fast as any that I know of.

Q. Could you give an estimate, Mr. Walker, of what depreciation there would be against the "Telegraph," as compared with an exactly similar boat built new? A. You mean in percentage?

Q. Yes. [21]

Mr. MERRITT.—I make the same objection.

A. I assume the depreciation on the hull and woodwork at about twenty-five per cent. On the furnishings and equipment about the same. On the machinery about ten per cent.

Q. Now, the figures that you have given of approximately seventy-five thousand dollars, not including architects' fees, are proportioned as to hull and woodwork and furnishings and machinery at about how much?

A. The machinery about thirty thousand dollars; the hull and house the same, and the equipments and furnishings about fifteen to twenty thousand dollars.

Q. And you figure a depreciation of twenty-five per cent against the hull, and twenty-five per cent against the furnishings and ten per cent against the machinery. In other words, the "Telegraph" would be worth as much less than seventy-five or eighty thousand dollars, plus architects' fees, as

(Testimony of Frank Walker.)

these items depreciated in the proportion that you indicate, as to the total cost of the boat?

A. Yes, sir.

Cross-examination.

Q. (Mr. MERRITT.) Mr. Walker, would the cost of the vessel at the present time be more or less than it would in 1903, when she was constructed?

A. It would be more at the present day.

Q. You have figured, in giving this estimate, on building an entirely new vessel like the "Telegraph," in the construction of an entirely new vessel in all respects [22] of course? A. Yes, sir.

Q. With new machinery and new boilers?

A. With new machinery and new boilers.

Q. And new furnishings?

A. New hull and furnishings.

Q. Everything first class.

A. Yes, sir, everything just about the same as the "Telegraph" had, first class.

Q. You figure on the same style of boiler?

A. I figure on the same style of boiler.

Q. And the same kind of engines?

A. Same engines.

Q. Same furnishings? A. Same everything.

Q. You say that last year she was overhauled very extensively. That is the time the cylinder blew out.

A. The time the cross-head bands carried away and carried the cylinders and connecting rod away.

Q. Considerable damage done at that time?

A. Yes, sir.

(Testimony of Frank Walker.)

Q. That damage was repaired? A. Yes, sir.

Q. That was the extent of the overhauling, was it not? A. Oh, no.

Q. What other work was done?

A. There was considerable overhauling by the owners generally.

Q. To what extent?

A. Well, there was considerable overhauling of the house, [23] and carpenter work and plumbing, piping and the boiler.

Q. Who did this work?

A. The Seattle Construction and Dry Dock company did the work to the machinery, and did some of the other work and the owner's own carpenters and own shore gang did considerable of the overhauling.

Q. What proportion did the owners do?

A. Oh, I don't know. I could not state in dollars and cents but several thousand dollars.

Q. But the work on the engines was due to this accident?

A. The work on the engine was necessitated in the first place by the accident, then the entire machinery was overhauled.

Q. You figured new boilers and new machinery at thirty thousand dollars? A. Yes, sir.

Q. You figured that the hull and the house at thirty thousand dollars? A. Yes, sir.

Q. And the furnishings and equipment at twenty thousand dollars? A. Practically.

Q. Now, how would you divide this thirty thou-

(Testimony of Frank Walker.)

sand dollars as between the hull and the house?

A. I have not got the details of my estimate here.

Q. You know enough about the construction of vessels so that you can now make an approximate apportionment of that thirty thousand dollars between the hull and the house?

Mr. BRONSON.—If you want him to make an exact estimate [24] he can take the time to produce it for you.

A. No, because there is so much considered in beside actually the house.

Q. Well, how much would consider the cost of the hull alone?

A. Where are you going to stop on the question of the hull, which deck?

Q. There is a marked line, pretty well defined, in that type of a vessel, between the house and the hull?

A. Well, there are various ways of building a hull, you know.

Q. Well, I am talking about the hull of the "Telegraph," the way she was built.

A. I could not segregate it. I haven't the details in my head.

Mr. BRONSON.—We will furnish that for you, Mr. Merritt, at a later time.

Q. You could not then now give any estimates as to the cost of the hull as separate from the cost of the house?

A. I do not care to divide the estimate at the present time.

(Testimony of Frank Walker.)

Q. Then you could do it if you cared to?

A. I do not intend to without seeing my detail of my estimates.

Q. How would you divide the cost of the boiler and engines?

A. I have given you that as a lump sum.

Q. I ask you how you divide it.

A. The boilers and engines and cylinders is a lump sum.

Q. How would you divide that thirty thousand dollars?

A. That is the same question as to the hull. [25]

Q. You cannot or will not give any estimate as to the cost of the boilers separate from the cost of the engine?

A. I am not prepared to make any segregation of that estimate at the present time.

Q. What do you include in that twenty thousand for the furnishings and equipment?

A. The entire furnishings and equipment.

Q. What is included in that?

A. I am not going to make any segregation of my estimate. I gave you an estimate of the hull, I apportioned it as hull and boilers and machinery and outfit and equipment, and I don't intend to make any estimate or segregate it here at the present time.

Q. Can you tell what was included in this estimate of furnishings and equipment?

A. I can tell you what I included.

Q. Well, what was it?

(Testimony of Frank Walker.)

A. I have stated all the furnishings and equipment.

Q. The Court wants to know and I want to know what they were, what you included in that?

A. I include carpets, curtains, linoleum, chairs, galley, pantry, dining-room furniture, life-preservers, mattresses, bedding and all that.

Q. What did you figure the cost of the dining-room chairs and carpets?

A. I am not going to give an estimate.

Mr. BRONSON.—The witness has testified he can give the details if you want, but he is not prepared to-day to do it. I think you are wasting time asking these questions over and over. We will produce them [26] if you want, at any subsequent time.

Q. Then, Mr. Walker, at the present time, you have no recollection, and are unable to give any estimate as to the cost of the various separate items that go to make up the hull and the house, and engines and boilers and furnishings and equipment, is that right?

A. I did not come here prepared to give details of my estimate.

Q. I say you cannot give any separate estimate at this time? A. At this time, no.

Q. Upon what do you base your estimate?

A. My experience and knowledge of the construction of vessels.

Q. And your experience and knowledge is not sufficient, so that now, without the aid of some mem-

(Testimony of Frank Walker.)

orandum that you have not here, you cannot give any segregation of these items?

A. No one would give a segregation without their notes and their estimate before them.

Q. I say, your experience and knowledge is not sufficient so that you could even make an estimate, an approximate estimate of the cost of the boilers separate from the cost of the engines?

A. My recollection without my notes is not sufficient.

Redirect Examination.

Q. (Mr. BRONSON.) In other words, the items that have gone into this estimate here, would be hundreds, perhaps thousand of items?

A. Yes, a great number of items. [27]

Q. And would any man be able to carry these things in his head? A. No, sir.

Q. You have not the data here but can produce it at a later time? A. Yes, sir.

Q. You answered the question that it would cost more to build the boat now than when she was built. Would it cost more in labor and materials or both?

A. Both; yes.

Q. (Mr. MERRITT.) How many separate items go to make up the item of the boilers?

A. I have answered you.

Q. I insist on an answer. You stated several hundred. I want to know how many of them go to make up the item of boiler?

Mr. BRONSON.—I think the question should be made definite and certain. Whether you mean the

(Testimony of Frank Walker.)

shell of a boiler and whether it is before the boiler is in the boat or out of it.

Mr. MERRITT.—I am asking the question.

A. Do you include piping, and cover and stops and all that?

Q. What did you include?

A. I want to know what you are asking me.

Q. I ask you how many items go to make up your estimate of the boilers.

A. I cannot tell you how many.

Q. Was there more than one? A. Yes. [28]

Q. What other ones besides the boilers themselves go to make up the estimate of the cost of the boilers? A. The necessary parts of the boiler.

Q. What parts of the boiler go to make up the boiler?

A. There are valves and fittings on the boilers and mountings on the boilers and all kinds of things to make up the boiler.

Q. That is all included in the boiler, when you buy a boiler you buy all these things with it?

A. I am not figuring what goes to make up the boiler but I am figuring on the cost of the boat.

Q. How many different items go to make up the one item of the engines?

A. A great number.

Q. A great number of different things make one complete engine, don't they? A. Yes, sir.

Q. But a complete engine is one thing, is it not?

A. No.

Q. How many different items go to make up a complete engine?

(Testimony of Frank Walker.)

A. I have told you a very great many, but I could not say right offhand.

Q. (Mr. BRONSON.) But as a matter of fact, Mr. Walker, a great many things go into an assembled boiler and engines don't they, on a boat?

A. Most decidedly.

Q. As a matter of fact can you buy a boiler stripped or can you buy it assembled? [29]

A. You can buy it in various ways.

Q. You can buy it any way you want to, and just what you want to pay for? A. Yes, sir.

Q. (Mr. MERRITT.) You can buy the grate separate and the nuts and bolts separate and all these different parts?

A. You can buy a boiler knocked down or built up, as you want.

Mr. MERRITT.—I move to strike all of the evidence of the witness as incompetent, irrelevant and immaterial, as not a proper estimate or measure of damages in this case, for the reason the witness has shown himself incompetent to testify as to the cost of the various items to which he has undertaken to testify.

Mr. BRONSON.—The libelant undertakes to and offers to produce the witness at a further time with all of the data, so that you can go into a prolonged investigation if counsel desires.

(Witness excused from the stand.) [30]

**[Testimony of W. S. Matthewson, for Libelant.]**

W. S. MATTHEWSON, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) What business are you engaged in?

A. I am an estimator with the Seattle Construction & Dry Dock Company.

Q. Shipbuilders? A. Yes, sir.

Q. Do you know whether the Seattle Shipbuilding & Dry Dock Company made an offer to rebuild a vessel similar to the "Telegraph," carrying her speed, etc.?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial; not the proper measure of damages, and calling for testimony that is not the proper measure of damages in this case.

Mr. BRONSON.—That is introductory.

A. We prepared a proposal.

Q. Did you prepare estimates from which the proposal was made? A. I did.

Q. What was the proposal as made?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and not furnishing any proper basis for measuring damages in this case.

Mr. BRONSON.—I will change the question. I have to consider the witness' estimate involves a profit, probably.

Q. Based upon your estimates, what would it cost to build the "Telegraph" and deliver her to a purchaser outside, as distinguished from your own cost, that does not include your profits?

(Testimony of W. S. Matthewson.)

Mr. MERRITT.—I renew my last objections.

[31]

A. I can refer to our proposal; I have not got the exact figures at hand.

Q. Do you know what it was approximately?

A. Ninety-two thousand dollars.

Mr. MERRITT.—I object, the evidence shows that the proposal was in writing.

Mr. BRONSON.—We are going to offer it.

(Paper marked libelant's identification "A.")

Q. Refer to this identification "A" and state whether that was the proposal made?

A. That is right.

Q. Did you prepare the estimates for this proposal? A. I did.

Q. That involved a new vessel.

A. A new vessel?

Q. And this estimate, was this based upon your idea of the cost to the purchaser of such a vessel at the present time?

Mr. MERRITT.—I object to his giving an idea of the estimate. A. It was.

Q. What experience have you had in your business?

A. Well, as estimator I have been four years connected with the Seattle Construction & Dry Dock Company.

Q. That is the old Moran company?

A. Yes, sir.

Q. What experience had you had previous to that?

(Testimony of W. S. Matthewson.)

A. Why, I am a graduate, Cumberland graduate. I have had six to eight years' experience in the draughting-room and after that I was estimator.

Mr. BRONSON.—I offer this identification "A" in evidence. [32]

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial and not furnishing any proper basis for estimating the damages in this case for the reason it refers to certain specifications in this case that are not in evidence.

(Paper marked Libelant's Exhibit "A," filed and returned herewith.)

Q. Were you familiar with the "Telegraph" at all? Have you seen her and been aboard of her?

A. Yes, sir, I have.

Q. Was this proposal based upon practically a duplication of the "Telegraph"?

A. About as good as the "Telegraph."

Q. And very similar in dimensions?

A. Yes, as near as we could get.

Mr. MERRITT.—I object upon the further ground that it appears it was not a duplication of the "Telegraph," but what the witness states would be a boat as good as the "Telegraph," as an additional ground to my former objection.

Q. Was this boat to be any better boat than the "Telegraph" was when she was new? As near as practicable was it not to be a boat the same as the "Telegraph" was when she was new?

A. Yes, the proposal so specifies.

Mr. MERRITT.—I object to the question as call-

(Testimony of W. S. Matthewson.)

ing for a conclusion of the witness. His specifications on which this tender was made should be offered in evidence. [33]

Cross-examination.

Q. (Mr. MERRITT.) Mr. Matthewson, did you have any specifications upon which you based your estimate?

A. I had my personal knowledge of the "Telegraph" and outline specifications of the machinery.

Q. Did you have any other specifications than the outline specifications of the machinery?

A. I did not.

Q. Any specifications of the hull? A. No.

Q. Any specifications of the boilers? A. I did.

Q. Any specifications of the furnishings and equipment? A. No.

Q. All you had, then, to base this tender upon, so far as the hull and equipment was concerned was your personal recollection of her hull and equipment?

A. Not recollection only, I had been aboard the "Telegraph."

Q. When?

A. I should say about four months ago.

Q. How long were you on board?

A. I was there, I should say, four hours.

Q. Where was she?

A. She was down at the Heffernen Drydock.

Q. And did you make up at that time any specifications of her hull and house and furnishings and equipment? A. We had specifications.

(Testimony of W. S. Matthewson.)

Q. You had them? A. Yes.

Q. Were they written? [34]

A. They were written.

Q. You did not have the same specifications at the time you made up this tender?

A. The specifications for the house were the same, the specifications from which this proposal was made.

Q. You did have them, you had specifications of the house at the time the proposal was made?

A. Yes.

Q. Did you have of the hull? A. No.

Q. You did not at any time? A. No.

Q. Nor any specifications of the furnishings or equipment? A. No.

Q. Then all that you had to make and to base this tender upon as to the hull and furnishings was your recollection of the hull and furnishings and equipment from being aboard of her about four hours four months ago?

A. Taking dimensions of the scantlings and notes of the construction.

Q. What was the purpose of going aboard her at that time?

A. It was a proposal calling for repairs.

Q. That was after she was sunk? A. Yes.

Q. You were not aboard of her before that?

A. I had been aboard of her before he gave the estimate.

Q. When had you been aboard of her before she was sunk? A. I am not able to state.

(Testimony of W. S. Matthewson.)

Q. Could you tell about how many times?

A. No, I cannot. [35]

Q. Could you say whether it was within a year previous to the time she was sunk?

A. Why, I think it was, but that is not a definite answer.

Q. But you did not go aboard of her with the idea at that time, I am referring now to the time previous to the time she was sunk, with the idea of making up any estimates or specifications of her hull or machinery? A. I did not.

Q. And you did not make any such specifications?

A. No.

Q. Did not take any particular note of how her hull was constructed or what furnishings or equipments she had? A. No, not specially.

Q. This tender contained in Libelant's Exhibit, "A" was made up by you? A. It was.

Q. Have you the written specifications of the house and the engines and boiler, which you used at the time you made this up?

A. I believe I have.

Q. I ask you to produce them.

A. I haven't them with me.

Q. I will ask you to produce them, the written specifications which you had and used in making up this proposal. Can you do so?

A. I think I can.

Q. This proposal was to build an entirely new vessel? A. It was.

Mr. MERRITT.—I request the witness to pro-

(Testimony of W. S. Matthewson.)

duce the written specifications which he had. [36]

Mr. BRONSON.—We are willing to do it. We understand you are attorneys for the concern he works for, and we expect you to furnish your own data in that respect. We are agreeable that the witness should do it.

Redirect Examination.

Q. (Mr. BRONSON.) The last time you went down there, at the time you testified you went down for the express purpose of properly informing yourself as to the equipment and structure, etc., of the vessel? A. Yes, I did.

Q. State whether you have been aboard the "Telegraph" a great many times, so that you were familiar with the vessel?

A. Well, I cannot say that I have been aboard a great many times, but I am familiar with the vessel. Once was enough to get familiar with the vessel, because I went over it very thoroughly.

Q. (Mr. MERRITT.) The familiarity you say you have now was from an inspection of her after she was raised?

A. And as I said there were specifications purporting to be a duplicate of the house as it was before they were washed away.

Q. You do not know whether these were correct specifications of her before the house was washed away?

A. It is my understanding that it was prepared by the surveyors, who naturally would prepare them accurately.

[**Testimony of Fred A. Ballar, for Libelant.**]

FRED A. BALLAR, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) What is your profession, Mr. Ballar?

A. I am a naval architect and consulting engineer and marine surveyor.

Q. You live in Portland? A. I do.

Q. What has been your experience and qualification as naval architect and consulting engineer?

A. I served my apprenticeship in a shipyard in 1874 to 1877 and passed through a naval academy and been in the profession ever since.

Q. From 1874 to 1877 that is when you served your apprenticeship?

A. I was in the shipyard and then went to the naval academy in Berlin and came out of it in 1879 and have been engaged in that business ever since.

Q. You frequently build ships, do you, supervise them? A. That has been my occupation.

Q. Were you familiar with the "Telegraph" before she was sunk? A. I was.

Q. In a general way with her structure, machinery, etc.?

A. I have been aboard of her a good many times in Portland.

Q. You had seen her in Portland?

A. Oh, yes, I had seen her there frequently.

Q. Are you familiar, and I speak, of course, in the accepted general sense, with the cost of construction of vessels upon which you put estimates, at the

(Testimony of Fred A. Ballar.)  
present time, I mean?

A. That has been my occupation for years. [38]

Q. You are familiar? A. Yes, sir.

Q. Do you know approximately what it would cost to build a vessel, as nearly similar as it could be built, to the "Telegraph," build her new, at the present time, having the same qualification as to speed as the "Telegraph"?

Mr. MERRITT.—I object for the reasons heretofore stated to the same line of evidence.

A. It will depend somewhat on the location of building.

Q. Either here or at any other place?

A. Well, you could figure the cost of a vessel similar to her, equal to her and similar to her at a cost of upwards—say between seventy-five and seventy-six thousand dollars.

Q. Where?

A. You could build her for that in Portland.

Q. Then it would be necessary to bring her to Puget Sound. Do you know what that would cost, have you any idea what it would cost?

A. If the vessel would be insured and come in the summer or autumn, it would cost several thousand dollars.

Q. Do your figures of seventy-five to seventy-six thousand dollars include architects' fees?

A. No.

Q. What are the modern naval architects' fees?

A. Five per cent of the cost.

Q. That is the usual and ordinary and customary

·(Testimony of Fred A. Ballar.)

charge? A. That is the customary charge.

Q. You did not add that to your figures?

A. No, that was just the cost of the vessel. [39]

Q. Would a vessel cost more to build now than it would in 1903, a vessel similar to the "Telegraph"?

A. Well, about ten per cent more now.

Q. On account of labor, materials or both?

A. Well, both.

Q. Now, you say you were familiar with her. You have seen her how recently, the "Telegraph"?

A. Prior to the accident?

Q. Yes.

A. I do not believe I have been on the boat within the last two years.

Q. Do you know what condition she was in then as to upkeep?

Mr. MERRITT.—I object as irrelevant and immaterial.

A. I think she looked better here in Seattle than she did in Portland, was kept better.

Mr. MERRITT.—I move to strike the answer as not responsive and as irrelevant and immaterial.

Q. Was she, when you saw her last in Seattle, in fairly good condition?

A. I beg to modify that last answer this way: I saw the boat along the dock here, probably dozens of times, without going aboard of her.

Q. That is what I refer to, going aboard to look at her.

A. I do not believe I have been aboard the boat within the last two years, more than twice.

(Testimony of Fred A. Ballar.)

Q. What was her condition then as to upkeep and general repair, was she in good condition?

A. My impression was that she was well kept up. I may state here that I used to go on the boat to Bremerton when she was under charter by the Navy Yard Route; that [40] was about three years ago, I was building the "Tourist" at that time for the Navy Yard Route.

Q. So that you had opportunity to be quite familiar with her?

A. I went over her at that time for the purpose of making a comparison between the scantling of that boat and measured her all up at that time with the boat I was then designing and building for that Route.

Q. Mr. Ballar, what, in your opinion, would be the percentage of depreciation in the aggregate, or take the parts if you care to segregate them to the "Telegraph" as against a new boat at the present time similar to her?

Mr. MERRITT.—I renew my objections.

A. From my personal observation of the condition of the hull, the surveys that were made lately, I found her hull in absolutely sound condition with the exception that a few timbers, and I do not believe her hull has depreciated more than 15 to 25%, without making borings you could hardly tell, but I do not believe it would exceed 20%.

Q. To the hull itself? A. Yes, sir.

Q. What would you say as to the machinery?

A. Well, I believe the machinery was in as good

(Testimony of Fred A. Ballar.)

condition as when new except as to the ordinary wear and tear, especially on the boiler, it is not so much on the engine as on the boiler. I believe that Mr. Walker's estimate of ten per cent would be probably fair, taking a fair proportion between the engine and the boiler; I [41] do not believe the engine was depreciated at all.

Q. What would be the depreciation upon her furnishings and fittings?

A. If you include in the furnishings the boat deck outfit, boats, lines, etc., I should judge it would be between 20 and 30%.

Cross-examination.

Q. (Mr. MERRITT.) You say, Mr. Ballar, that you had not been on her for two years?

A. I did not say that. I say I had not been on the boat in the last two years more than twice.

Q. When were you on her these two times?

A. I could not state the exact date, because I go back and forth on these boats all the time.

Q. Could you be certain that you had been on her at all during that time?

A. Yes, sir, I am certain of that.

Q. Where did you go on her, if at all?

A. I have been on her at the Colman dock.

Q. Went on board of her when she was at the dock? A. Yes, sir.

Q. Not for the purpose of making any examination? A. Not within the last two years.

Q. In fact you did not make any investigation as to her within the last two years?

(Testimony of Fred A. Ballar.)

A. No, I have not.

Q. The principal investigation you made was about three years ago when you were building the "Tourist"?

A. Yes, sir. I may state that I made an examination of the [42] hull and the condition of the hull lately, after the accident?

Q. After the accident?      A. Yes.

Q. I am talking about previous to the accident. So, of course at the time of the accident, you do not know what furnishings and fittings she had on her at all?      A. Yes, I do.

Q. How do you know?

A. Because I made a note of it.

Q. At the time of the accident?

A. No, after the accident. I say I made notes from the remnants of what I found that was left.

Q. Her house was off at that time?

A. No, the house is not off now.

Q. Badly damaged and part was gone?

A. Some left, enough left.

Q. Some furnishings and fittings and equipment gone?

A. Some were gone, but there was enough remnants left to tell what the furnishings had been.

Q. You base your present estimate on the cost of a new vessel, on what you knew of the "Telegraph" at the time you made this investigation of her when you were building the "Tourist"?

A. No, I did not. I made that estimate from my knowledge of building ships and the approximate

(Testimony of Fred A. Ballar.)

cost of this kind of a vessel.

Q. I say your knowledge of the vessel itself was based upon what you found on her and found her condition to be at the time you built the "Tourist" and on her condition that [43] you found since?

A. Since I made my survey of her about a month ago.

Q. With whom are you connected? Anybody in Portland? You are in business by yourself?

A. I am in business by myself.

Q. Constructing vessels.

A. My profession is the construction and superintending of vessels for owners and shipyards.

Q. As naval architect.

A. As naval architect. I may also state that I am surveyor for the American Record, Bureau Veritas, the German Lloyd's, the Vessel Owners of New York, and the German Insurance companies.

Q. You do not know what use the vessel has had during the past two years.

A. Yes, I do.

Q. Of your own knowledge?

A. Of my own knowledge.

Q. How do you know; have you been aboard of her more than the times at the dock?

A. I saw her running. I know what she is about and I saw her running.

Q. Do you know how many accidents have occurred or what kind of care she has had?

A. I do not.

Q. Then I say, of your own knowledge you do not know what use she had had or what care she had

(Testimony of Fred A. Ballar.)  
had during that time?

A. If you mean by the word "use" the same as I do, I mean the use she is put to. [44]

Q. You knew she was running here.

A. I know what she was doing. If you mean the usage, I would not be able to answer.

Q. You would not know about the care of any of her parts during that time, or whether or not she sustained any accidents or what actual depreciation had occurred during these two years.

A. I base my estimate of depreciation of a vessel on the condition of the timbers as I found them in the hull, which is really the depreciation that you can count on the main thing in a wooden vessel; as long as the timbers in a vessel and the fastenings keep in good condition there is very little depreciation.

Q. You did the best you could without making borings?

A. You can tell a piece of timber.

Q. That is the fact, is it not? A. Yes.

Q. And in order to tell just what condition her hull is in you have to make borings.

A. That applies only to certain parts of the vessel.

Q. It does apply to certain parts?

A. Not in this kind of a vessel, for the reason this vessel is an open vessel, her hull is open and in sight; there is hardly any part of the vessel that you cannot inspect. The only time you make borings in a vessel is when parts are hidden by ceilings

(Testimony of Fred A. Ballar.)

and you cannot see; but the timbers of the vessel here were subject to inspection. The only place you cannot see is the forefoot, at the end of the planks, which is a small percentage of the construction of a vessel itself. [45]

Q. The fact is you did not make any borings?

A. No.

Mr. MERRITT.—I move to strike the evidence of the witness on the ground that the same is incompetent, irrelevant and immaterial; it does not furnish any proper basis for estimating the damages in this case, and on the further ground that the witness has not shown himself competent to testify as to the condition of the vessel at the time of the accident.

#### Redirect Examination.

Q. (Mr. BRONSON.) Mr. Ballar, you say that you figure that it would cost seventy-five to seventy-six thousand dollars, plus architects' fees, to build a vessel similar to the "Telegraph" in specifications and speed, and that there was a depreciation of twenty per cent on the hull and ten per cent on the machinery and twenty to thirty per cent on the furnishings and fittings. Would you say that the "Telegraph," previous to the accident, was worth the difference between the seventy-five or seventy-six thousand dollars, plus five per cent, and the sum of the depreciations which you have mentioned?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and as not calling for evidence which would furnish a proper estimate of damages in this case, and for the reason that the witness has

(Testimony of Fred A. Ballar.)

not shown himself competent to answer the question.

Q. In other words, would you say the "Telegraph" was worth previous to her loss how much?

Mr. MERRITT.—I renew my last objection.

[46]

A. I would say seventy-five to seventy-six thousand dollars less the depreciation which I figured.

Q. In other words, she was worth seventy-five or seventy-six thousand dollars less the depreciation.

Mr. MERRITT.—I make the same objection.

A. Yes, sir.

Q. Now, for the purpose of making these depreciations ascertainable, you have given twenty per cent on the hull, ten per cent on the machinery and twenty to thirty per cent on the furnishings. Now, how would you divide the cost, seventy-five to seventy-six thousand dollars as to the hull machinery, furnishings and fittings?

A. I would call the hull about twenty-five thousand dollars; I would call the machinery about thirty thousand dollars, and the equipment and ship fittings and things of that kind, twenty-five thousand dollars.

Q. You would have to include the architects' fees on top of the seventy-five thousand dollars?

A. This would be the cost of the vessel outside of that.

Mr. MERRITT.—This is subject to the same objections and I renew my motion to strike as to this testimony.

(Testimony of Fred A. Ballar.)

Q. (Mr. MERRITT.) You are not engaged in business in Seattle, are you, Mr. Ballar?

A. You mean I have no office here?

Q. Do you have an office here?

A. Is that a question?

Q. I now ask you, do you have an office here?

A. No, I haven't an office in Seattle. I am consulting [47] engineer for the Inland Navigation Company and for the Port Orchard Company.

Q. That is the owners of the "Telegraph"?

A. Of the "Telegraph" and other vessels.

Q. But you reside in Portland?

A. I make Portland my home.

Q. Have your office there?

A. I have an office there.

Q. You have no place of business in Seattle?

A. No.

Q. Your business in Seattle is simply when you come here to consult with your clients here or some one else that may call you here to consult with them about the construction of a vessel.

A. That is it.

Q. (Mr. BRONSON.) And you do build vessels here when called upon? A. I do.

Q. Do you know, Mr. Ballar, whether or not it would cost more to build a steamer like the "Telegraph" in Seattle than Portland, or vice versa?

A. I believe that type of vessel it would be cheaper to build in Portland than here.

Q. Owing to what?

A. Well, owing to the familiarity of the workmen

(Testimony of Fred A. Ballar.)

that you get in Portland with that class of vessel,  
that class of work.

Q. Stern-wheel boats, you mean.

A. Yes, sir. [48]

Q. (Mr. MERRITT.) The last vessel you built  
in Seattle was the "Tourist," three years ago?

A. It was built in Port Blakely.

Q. You have built no vessel here in Seattle?

A. No.

Q. You have not built any vessel on Puget Sound  
within three years, have you?

A. No. I did not build the "Tourist," I superin-  
tended the building for the owners.

Q. That was three years ago? A. Yes, sir.

Q. That was the last vessel you had occasion to  
be connected with the construction of on Puget  
Sound?

A. No, since that I have looked after the rebuild-  
ing of the "Athlon," in King & Winge's yard.

Q. When was that?

A. That was just prior to the Fair.

Q. Just prior to the A. Y. P. Fair?

A. Yes, sir.

Q. When you testify as to the value or the worth  
of the "Telegraph," you mean simply what you con-  
sidered would be the cost of a new vessel of such  
type, and finished and furnished as you understand  
the "Telegraph" had, less the depreciation that you  
have given on the different parts? A. Yes, sir.

Q. (Mr. BRONSON.) Is not any vessel, Mr. Bal-  
lar, worth exactly what it cost to build her to-day,

(Testimony of Fred A. Ballar.)

less the depreciation which she has suffered by the age of the vessel? [49]

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

A. That would be the cost of the vessel to the owners.

Q. That is her value?

Mr. MERRITT.—I renew my objection.

A. That is the value to the owners.

Q. (Mr. MERRITT.) That is what you intend to give as the cost to the owners.

A. That would be the value of the vessel to the owners.

Q. That was the value you intended to give?

A. Yes, sir.

Mr. MERRITT.—I renew my motion to strike the evidence of the witness, on the grounds stated, and the evidence as to value on the further ground that it is incompetent, irrelevant and immaterial, and the witness has not shown himself competent or qualified to testify, and the same does not furnish any proper basis for the estimate of damages in this case.

(Testimony of witness closed.)

Hearing adjourned until Monday, August 12, 1912, at 11 A. M. [50]

Seattle, Washington, August 12, 1912.

Present: Mr. BRONSON, for the Libelant.

Mr. MERRITT, for the Claimant.

[**Testimony of L. Simen, for Libelant.]**

L. SIMEN a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) What is your business?

A. Superintendent Heffernen Engine Works and Drydock Company.

Q. What is the character of the business principally? Marine engine work?

A. Marine engine work, repair work and drydock work.

Q. They also operate the Heffernen Drydock?

A. Yes, sir.

Q. That includes building and repairing of ships?

A. Yes, sir.

Q. What experience have you had, what length of time have you been engaged in that line of business?

A. Eight years directly in that line.

Q. Were you familiar with the "Telegraph," did you know what sort of vessel she was?

A. Yes, sir.

Q. Was she down on your dock after she was in the collision? A. Yes, sir.

Q. Did you look her over? A. Yes, sir.

Q. Thoroughly examine her? A. Yes, sir.

Q. Did you prepare estimates from which was made a proposal to build a new vessel to take her place? A. I did, sir. [51]

Q. What did you estimate would be the cost of

(Testimony of L. Simen.)

building a new vessel similar or as nearly as possible a duplicate of the "Telegraph"?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and as not furnishing any proper basis for estimating damages in this case.

A. That is on the complete vessel that you have reference to?

Q. Yes, sir. A. \$76,600 was our estimate.

Q. For building a vessel the counterpart of the "Telegraph" as near as it could be done?

A. Yes, sir.

Q. Would it be any better ship than if she were new,—in other words, was it to duplicate her except that she would be a new vessel?

A. That is the idea, absolutely the same vessel, sir.

Q. Would that be the reasonable cost to the purchaser or owner of the vessel?

Mr. MERRITT.—I renew my last objection.

A. I should say so.

Q. Are you able to estimate the depreciation of the "Telegraph," what difference there would be between her and a new vessel?

A. I would be after examination, but I did not make an examination for that purpose to determine what the depreciation was.

Q. Could you segregate your \$76,600 into three portions, say of boiler and engines, and hull and house furnishings, approximately?

A. This \$76,600 did not include the furnishings or equipment, [52] but simply to pass inspection, sir, nothing beyond.

(Testimony of L. Simen.)

Q. It did include all the equipment necessary to pass inspection.

A. Yes, but none of the carpets or chairs or anything of that kind.

Q. You do not furnish these?

A. Not in this estimate.

Q. Could you by making a further examination of the "Telegraph" give an estimate of the depreciation upon her hull and machinery?

A. Yes, sir, after an examination; it would take some time.

Q. I wish you would do that. A. All right.

#### Cross-examination.

Q. (Mr. MERRITT.) I will reserve my cross-examination until that time, except I would like to ask if you had any written specifications of the "Telegraph"?

A. No, sir, no written specifications. I just went over the vessel and took the sizes of the machinery and work of that kind, sir.

Q. That is all you had, then, to base your bid on then, your inspection of the vessel on the drydock?

A. And experience in that kind of work.

Q. Did you make up from that investigation any specifications of her hull or house or engines and boilers, anything of that kind?

A. Only took notes, sir, kept a record of it that way.

Q. Have you got these notes?

A. I have them at the works. [53]

Mr. MERRITT.—I will ask the witness to pro-

(Testimony of L. Simen.)

duce the notes upon which he based his tender, at the next hearing, and I will reserve further cross-examination until that time.

Mr. BRONSON.—I wish you would make such examination of her as will enable you to figure the depreciation.

(Witness excused from the stand.) [54]

[**Testimony of C. D. Scott, for Libelant.**]

C. D. SCOTT, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) How many years have you been acquainted with ships and steamboats on Puget Sound?

A. On Puget Sound? I built the "Fleetwood" and came here first. I cannot tell exactly the year. I built the "Flyer" twenty-three years ago.

Q. You built the "Fleetwood" before you did the "Flyer"? A. Yes, sir.

Q. Did you build the "Telephone"?

A. Yes, sir.

Q. And "Telegraph"? A. Yes, sir.

Q. How many different vessels have you built?

A. Fifteen I have built in my time.

Q. The "Fleetwood," "Flyer," "Telephone" and "Telegraph" are all fast vessels, are they not?

A. Yes, sir, of everything that has been built yet.

Q. When did you build the "Telegraph," about how long ago?

A. I think she is about nine years old, built in 1903, I think, somewhere along there.

Q. Do you know what the "Telegraph" cost you?

(Testimony of C. D. Scott.)

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and not furnishing any proper basis on which to estimate the damages in this case.

A. I ought to know, it was my money that built her and paid for her. The boys had a little, each of them; they were partners with me.

Q. You mean your own sons?

A. Yes, sir. [55]

Q. How much did she cost?

Mr. MERRITT.—I renew my objection.

A. She cost a little over seventy-five thousand dollars, with the machinery I last put in, compound engines.

Q. Were they in? A. Were they in? Yes.

Q. You are familiar with building ships, aren't you? A. I am, indeed.

Q. Did you design her yourself?

A. I designed her myself.

Q. Was she built economically or expensively?

A. Cheap as I could build a boat.

Q. That included the machinery that you bought from the O. R. & N.?

A. She did not cost that much at first.

Q. The total cost that you gave included the machinery which you bought from the O. R. & N.?

A. And the other, yes, sir.

Q. Now, did you pay the full value of that machinery? A. The first, you mean?

Q. Yes, the first machinery?

A. No, I got that for scrap prices, the first cost.

Q. What was the reason?

(Testimony of C. D. Scott.)

A. For the simple reason that it could be bought for that. It was too small for the boat the O. R. & N. wanted. John Gates was chief engineer and they wanted to build a bigger engine for larger boats, and it laid there all this time until I wanted to build the "Telegraph"; it was in their way and they sold it to me for scrap prices.

Q. Was the machinery in good shape? [56]

A. New machinery.

Q. That had not been used?

A. Just new machinery, built at the Willamette Iron Works, good machinery.

Q. Now, in the estimate you gave of the cost of the boat, did you include anything for your time, or the time of a marine architect, or anything of that sort?

A. No, nothing. I had a salary all the time from the company you know; nothing outside.

Q. Nothing of that kind included in it?

A. No, sir.

Q. Because you were able to design her yourself?

A. Nothing of that kind included at all.

Q. How was she built, substantially or poorly, or how?

A. Built number 1, the very best I could build a boat. Good boat,—strong, well put together, her fastenings. I always build that kind.

Q. Was she designed and built for speed?

A. Yes, entirely for speed; passenger boat.

Q. Do you know whether she could be built for any less money, or would it cost more now?

(Testimony of C. D. Scott.)

Mr. MERRITT.—I renew my objections.

A. Everything is higher to-day than when I built her; wages higher, and I think lumber is higher, and everything. I suppose it would cost considerably more—of course it would. I should judge it would cost ten thousand dollars more to-day to build the same boat and outfit her the way that boat was.

Q. Are you familiar with the value of such vessels?

A. I believe I am. I have built so many of them.

[57]

Q. What would you say the “Telegraph” was worth just previous to the time she was sunk by the “Alameda”?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and not forming a proper basis for estimating damages in this case; and, for the further reason the witness is not competent to testify.

A. Well, I thoroughly overhauled that boat when I put on that compound engine, and she was in number one order when I sold her to Mr. Green, almost as good as the day she was built, not quite, there might be a little difference, but she was not rotten any place. Everything was about perfect; we had carpenters there to do all that; everything was in fine shape.

Q. What would you say she was worth just previous to the time she was rammed?

A. She ought to have been worth seventy-five thousand dollars then. I would not have sold her for that only I wanted to quit steamboating.

(Testimony of C. D. Scott.)

Mr. MERRITT.—I move to strike the answer as not responsive and for the reasons stated in my objections.

Q. You think she was worth seventy-five thousand dollars?

A. She was worth close to seventy-five thousand dollars when I sold her to Mr. Green, because she was built for speed and there cannot everybody build that kind of a boat.

Mr. MERRITT.—I move to strike the answer.

Cross-examination.

Q. (Mr. MERRITT.) When did you sell the boat to Mr. Green?

A. I forget, but it was just a little after the Fair.

Q. You mean the Seattle Fair? [58]

A. Yes, sir.

Q. You sold him the "City of Everett" at the same time?

A. The "City of Everett" and the "Telegraph" at the same time.

Q. You had been operating both boats on the Seattle-Everett run for sometime? A. Yes, sir.

Q. You sold him the goodwill of your business at the same time, didn't you?

A. Of course they got everything.

Q. They got everything, they took the line of boats. A. Yes, sir.

Q. And what was the consideration of that sale?

Mr. BRONSON.—I object as incompetent, irrelevant and immaterial. There is no segregation of values; no way in which you could arrive at the

(Testimony of C. D. Scott.)

value of any one of the properties commercially.

Q. What did Mr. Green pay you for the two vessels and the goodwill? A. I forget what it was.

Q. Was it not fifty-five thousand dollars?

A. Something over that.

Q. How much over that?

A. I forget now what it was.

Mr. GREEN.—Fifty-five thousand dollars in cash was paid.

Mr. MERRITT.—It will be admitted the price was \$55,000?

Mr. BRONSON.—I will admit that is the amount that was paid but not admit that the fact is relevant or competent.

Mr. GREEN.—There were some other considerations but that was the amount in dollars and cents.

Q. What other considerations were there besides the cash [59] payments?

A. There was not much of anything really, that was just about it. We got passes and one thing or other.

Q. You got passes and things of that kind, but nothing of any substantial value over and above the fifty-five thousand dollars?

A. That was not considering what the boats were worth; I wanted to sell, was all.

Q. What kind of a boat was the "City of Everett"?

A. A nice little boat, very well built; cost, as near as I recollect forty-two thousand dollars when we built her.

(Testimony of C. D. Scott.)

Q. How long had she been built?

A. She was built before the "Telegraph"; I forget now.

Q. About how long, captain, a year or two?

A. It must have been. I never kept the books, my boys done all that. About three years before the "Telegraph," something like that.

Q. And the "City of Everett" was in good condition when you sold her?

A. Yes, overhauled all complete and everything before we sold her to Green; always keep my boats in good shape, but we had just overhauled her before we sold.

Q. You would consider, would you not, Captain, the relative value of the two boats, at the time you sold them to Green as the same proportion as they originally cost, that is forty-two thousand and seventy-six thousand dollars?

A. They depreciated a little but not very much. They were both sound, good boats. I could not tell you just what. They ought to have been worth a great deal more than what Green gave us. He could not have bought them for [60] that if we had not wanted to quit—for that money nor twice that.

Q. Captain, the "Telegraph" was built at the Sumner Iron Works at Everett, was she?

A. Yes, sir.

Q. And do you know how much the hull cost?

A. I do not. The hull and cabin was all built in one contract, but I really cannot say exactly what it was, but I think it was about \$15,000, something

(Testimony of C. D. Scott.)

like that. I forget. I have not set this down. I used to know. I could have told you before, what all the boats I ever built cost, but I forget. I am in my old age, and I do not try to recollect like I did.

Q. What is your best recollection, that the hull and house did cost you that? A. Yes, sir.

Q. And do you remember what you paid for the engines? A. Down at Sumner?

Q. When you bought them from the O. R. & N.?

A. New engines, we throwed these out.

Q. Did you throw out any old engines?

A. I bought them engines, the type first used in her, high compress-engines, and then I put in the new compound, and the boys figured that up, the bookkeeper, and it runs something like ten thousand dollars.

Q. That is for the new engines.

A. Yes, they were all new engines, well-built compound engines and everything fit.

Q. That ten thousand dollars included taking out the old engines and installing the new besides their cost? [61]

A. Yes; my boy says it cost twelve thousand dollars; maybe they did.

Q. Could not have been over twelve thousand dollars? A. Something like that.

Q. Now, Captain, is it not a fact it cost you more to take out the old engines and install the new engines, after the boat was built than if you had put in the new engines in the first place?

A. We took them out ourselves. I had three men

(Testimony of C. D. Scott.)

besides myself take out the old and put in the new, as I recollect.

Q. It cost you more than if you had put them in originally when the boat was built?

A. The wages of these men. It cost a little to take them out, but not much.

Q. The boiler was built at the Sumner Iron Works, was it not? A. Yes, sir.

Q. And after the vessel was completed the Government Inspectors refused to pass her because of a defect in the boiler?

A. It was a mistake of Mr. Cherry here, in putting over the wagon it did not go down quite far enough. They remodeled that at the same place, so that we got just what we asked for in the first place.

Q. Is it not a fact that the staples or bolts in the boiler, the regulations called for them to be six inches apart from center to center, and they put them over six inches apart? A. No.

Q. So that you had to put strips on?

A. I made that drawing myself. They were not four inches [62] apart, they were only  $3\frac{1}{2}$  center to center. I put more staybolts than the Government asks. That is a splendid boiler to-day, cannot be beat. No man can make a better boiler than that. It was a number one boiler; I made that drawing myself.

Q. You had to put a band around the boiler afterwards? Before it would pass?

A. No, sir. That has never been touched anywhere. It is a number one boiler.

(Testimony of C. D. Scott.)

Q. Now, about the furnishings, what kind of furnishings did she have?

A. The furnishings were number 1, cost me a heap of money. I cannot tell just what they cost. I know the whole boat cost a little over seventy-five thousand dollars, after it was completed and the new machinery put in.

Q. These furnishings were iron chairs—iron chairs for instance with plush on them?

A. Not exactly like the "Flyer's" chairs, a little different from that. I forget what they were. I could not really tell you what the cost was. Now, it is strange but I can tell you what the "Flyer's" cost. I recollect that, I know they cost \$32.50, every chair on the "Flyer" of that kind, but these chairs I do not recollect what they cost.

Q. Could you give any estimate of the entire cost of the furnishings, such as chairs, carpets, linoleum, etc.?

A. No, that was all down. I could not give it to you but it was all down; it was all right in there and they showed it to me when the boat was done each time. [63] I forget what the price of that was, but I know the whole cost was footed up and it was that much money.

Q. Now, you were drawing a salary from the company at this time? A. Yes, sir.

Q. And your sons too, from that company?

A. Yes, sir.

Q. You figured in these overhead expenses, did you, in the cost of this vessel?

(Testimony of C. D. Scott.)

A. I do not think it was; it was just the actual cost; that was not figured in.

Q. Do you remember about it?

A. No, that was not figured in, if it had been it would have cost a heap more, because I was getting \$200 a month; that was not figured in at all; it was the actual cost of the building of the boat.

Q. About what is the length of the life of a boiler like that, Captain?

A. A boiler of that kind will last—I think the Government—I have forgotten now how long they do allow them but within a certain time.

Q. Is it not about 15 years?

A. Yes, that long and maybe more.

Q. But a considerable period of time before the end of the life of a boiler the Government requires them to reduce the pressure on them, don't it?

A. Yes, sir.

Q. So this boiler was nine years old at the time of the accident?

A. I do not think they had reduced the pressure on that [64] boiler yet, because we ought to have had 182 pounds instead of 160.

Q. They had reduced the pressure?

A. Yes, they had. That was a mistake of Cherry here. I ought to have had 182 pounds, that is what I paid for the boiler to make. That was a mistake for the inspectors would not give me that on account of that "wagon-top foolish law" made in Washington. It didn't amount to nothing; it did not strengthen the boiler a particle in the world. But

(Testimony of C. D. Scott.)

I made a drawing and sent down to Uhler and asked if that would not obviate the wagon-top coming down by putting straps on and he said that was all right, that the law did not amount to anything but to put them on it and then we put them there.

Q. What pressure did you get?

A. 160 to 165, all I asked. I told them that was enough. I will tell you what the Inspector in Portland told me. He says, "I will get you 182 pounds, what you are entitled to." I said, "She would run all right and make 18 miles all the time easy every day," which she did between Astoria and Portland, she made it every day.

Mr. MERRITT.—I move to strike the answer as not responsive to the question and as irrelevant and immaterial and hearsay.

Q. Now, I say, Captain, that that pressure would have to be reduced in a year or two?

A. I don't think it would on account that the boiler was built for 182 pounds. I don't think they would reduce that pressure for a long time, maybe until the end of the boiler. [65]

Q. If they did reduce the pressure that would reduce the value of the boiler?

A. The boat would lose speed if they reduced that, certainly—no, to come right down to it, they would use a longer cut-off and burn a little more oil, that is all you would have to do, and you would get the same speed it would be a little more expense is all.

Q. These engines the O. R. & N. had had for a long time?

(Testimony of C. D. Scott.)

A. The O. S. N. Mr. John Gates designed those engines, and had them built for the O. S. N. company. And I built the "Telephone" after that and she was so much faster than any boat they had—no, I am mistaken; I believe they built the "Widewest" just before I built the "Telephone" and the "Telegraph" and they sent East and got bigger machinery, twenty-eight foot, and these were twenty-four six. And they laid in the house never touched.

Q. Had they been used at all?

A. Never used at all.

Q. What company do you mean by the O. S. N.?

A. That was before the O. R. & N. bought them out. They belonged to Reed and Captain Ainsworth and Cham and them three men had the most money, there were four of them.

Q. They sold out to the O. R. & N.?

A. Yes, and they laid all this time and were not used. They had no use for them.

Q. How long did you use these engines before you put in the compound engines.

A. I used them up to just before the Fair. [66]

Q. The Fair was in 1909, three years ago.

A. Just before the Fair we took them engines out and put in the new engines.

Q. Did you put in all new engines?

A. The whole thing was throwed out.

Q. You put in entirely new compound engines?

A. Yes, we put in entirely new compound engines; they were number 1, too.

Q. Where did you get these engines?

(Testimony of C. D. Scott.)

A. They were built right at Sumner Iron Works; they built them for me.

Q. The cost of the engines, then, that you were talking about was the cost of the new engines and old engines both?   A. Yes, sir.

Q. That included the cost of the old engines and the cost of the new engines.

A. I just simply throwed them out; gave them to some iron works for scrap.

Q. And this \$12,000 that you speak of, was that the cost of the new engines and the cost of both engines?

A. The cost of the boat in the first place with the old engines, you might call them, they were new then, they cost us as near as I recollect eight thousand dollars, and when we added the other that ran the cost up to over seventy five thousand dollars. I did not get anything for these engines we put out.

Q. When you speak of the value of a vessel, Captain, you mean what she was worth to the owners, don't you, what she cost originally, less whatever you might consider she had depreciated, is that what you mean by her [67] value?

A. Oh, yes, she was worth—she had depreciated very little because I overhauled her. I put everything new, anything that was a bit decayed, anything about the decks or beams, and everything.

Q. That is what you mean by her value?

A. She was in number one order when I sold her to Green.

Q. That is what you mean by value, of course, what she would cost to build her in her condition

(Testimony of C. D. Scott.)

at the time of the accident—you would consider, in other words, that she had cost you seventy-six thousand dollars and she had not depreciated, just as good condition as when she was built?

A. She had gone down but very little, if anything; she was perfectly sound.

Q. That is what you mean by saying in your opinion her value was about  $\frac{1}{2}$  75,000?

A. She was worth that; he could not have bought her for that if I had not wanted to quit or nobody else. We wanted to quit steamboating to go south—but we didn't go south. We had made money enough so as to afford to quit, that is the reason I gave them to Mr. Green almost, that is the truth of it. It was not because they were not worth money. They were good boats. When we sold the boats they were in fine order, good boats.

Q. But that is all you could get for them?

A. It is all they offered and we took it, we wanted to quit.

Q. You could not get anybody to give more, could you?

A. That did not decrease the value of the boats because [68] we sold cheap. There was no place for us to take them and we did not want to steamboat any more. We were making money up to that time, thirty to thirty-five thousand dollars a month clear money all the time in that trade—I mean a year. We made as high as forty-two thousand dollars one year.

Q. Now, just answer this question. You could

(Testimony of C. D. Scott.)

not find anybody at that time to pay you any more than Mr. Green would pay you?

A. There was one man offered more money to go to Portland; he was to pay more money, but when they came to get the money up, the man that had the most to pay with the others, did not come in.

Q. You could have got it if they had had the money to pay.

A. Yes, if the other parties had come in with him, I would have got about twenty thousand dollars more.

Q. But you could not get any more money than Mr. Green paid you?

A. When we were ready to go, we wanted to quit, to make a change.

Q. You took the best offer that you could get for them?

A. At the time nobody offered more; we just decided we would quit.

Q. These negotiations with Mr. Green covered some little time? A. In buying them?

Q. Yes, sir.

A. Oh, I guess it was not very long. [69]

#### Redirect Examination.

Q. (Mr. BRONSON.) Mr. Scott, you had been operating on the Everett route, hadn't you?

A. Yes, sir.

Q. And the "Interurban" was coming on, was it not?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial.

(Testimony of C. D. Scott.)

A. Yes, sir.

Q. You hadn't any other route that you could put these boats on? A. No, sir; we hadn't.

Q. And you wanted to quit business?

A. Yes, sir; that is the only thing, we wanted to quit.

Q. What is your age?

A. Eighty-five. I was old enough to quit steam-boating, anyhow.

Q. There is not any market for steamboats, is there?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial; the witness has not shown that he is qualified to answer the question.

A. I do not know anything about that. I haven't paid attention to it.

Q. When you wanted to sell these boats you naturally would have to sell them to someone that had a route to put them on?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial.

A. Oh, yes; nobody would buy them unless they had a place to put them.

Q. What was the maximum speed of the "Telegraph"? [70]

A. She would make eighteen miles all the time; if you wanted to make that speed she could run it right along.

Q. That is as a steady gait?

A. Yes, sir; the same speed.

Q. As a steady gait she could make it right along.

(Testimony of C. D. Scott.)

A. Yes, sir. There are not many boats, I can tell you, that can do that. They say some of them can make twenty-five, but they don't do it.

Q. What speed was the highest rate she ever traveled?

A. The fastest we ever ran that boat was to pass the "Flyer" right out here. I built the "Flyer," and I hated to pass her awfully bad. I told Seeley that I was going to show him how fast the "Telegraph" was, and I told him to get everything ready, and I talked to the engineer, too. I says, "I don't want to beat you but I am going to if I can. I built them both and I wanted to know which was the fastest boat. We started out past the bell buoy, and I beat him so bad—we would have beat him six miles between here and Tacoma. She made it in an hour and seventeen minutes to Tacoma, the "Flyer," that is the best run she ever made here. So you know the boat is pretty fast. She was a fast boat, that is all there was to it. That is the way I run a boat I build. I have always built for carrying passengers, and you have to go fast if you get the passengers. If a boat did not run fast she would not be worth anything to me. And no man knows what it cost me in thinking nights and Sundays and weeks and months to get that speed with little power, and I have been doing it every time. I could have got bigger power and more speed maybe, but [71] if you put bigger power on you break the boat down and you don't gain much. You have to figure all that over, and go over every part of your boat and

(Testimony of C. D. Scott.)

see what she will stand. And you must have your model in proportion and get your lines right and your power right and then you get speed.

Mr. MERRITT.—I move to strike the answer as incompetent, irrelevant and immaterial and not responsive to any question.

Q. (Mr. MERRITT.) Captain, you had two boys at the time you sold out, didn't you? A. Yes, sir.

Q. Both young men? A. Yes, sir.

Q. And they had been in business with you during all these years?

A. Ever since they had been on the Sound, and ever since I bought the "Greyhound," they were in business with me.

Q. And that was more than twenty-three years ago?

A. I don't know—I bought the "Greyhound" to get the trade.

Q. It was a long time ago?

A. Yes, sir; a good while ago.

Q. And both of these boys were in with you when you made the sale to Green?

A. Yes, both of them were with me.

Q. And the boat continued to run on this run from Seattle to Everett after you made this sale?

A. Mr. Green run them after I sold them.

Q. The "Telegraph" was a kind of pet of yours, your favorite [72] boat?

A. The best I ever built. They were fast boats; they were worth the money. They were worth buying.

(Testimony of witness closed.) [73]

**[Testimony of Captain H. B. Lovejoy, for Libelant.]**

CAPT. H. B. LOVEJOY, witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) What is your business?

A. I am manager of the Inland Transportation Company.

Q. Have you had experience in sailing and building vessels and steamboats?

A. More or less, building and running them.

Q. How many years, say?

A. Well, roughly, when I was sixteen I started in. That is a good while ago. I am fifty-two now.

Q. What vessels are you interested in on the Sound?

A. In the "Farallon," "Calisto," "Camano" and "Falcon."

Q. You have built vessels yourself?

A. Yes, sir.

Q. Were you familiar with the "Telegraph" before she was sunk? A. Yes, sir.

Q. Have you figured up with some degree of approximation the cost of building a vessel like the "Telegraph" at the present time? A. Yes, sir.

Q. What would you say she would cost at the present time, that is to build a vessel like the "Telegraph" at the present time? With the speed of the "Telegraph"?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, not forming any proper basis for estimating the damages in this case.

A. I think I have an estimate in there. I am

(Testimony of Capt. H. B. Lovejoy.)

President of the Everett Marine Ways, and made an estimate of \$86,500.

Q. Just look at Libelant's Identification "B" and see if [74] that is the estimate or bid that was made. A. Yes, sir, it is.

Mr. BRONSON.—I offer this tender in evidence.

Mr. MERRITT.—I object to it for the reason that it does not appear in the evidence that the vessel for which this tender was made was a vessel like the "Telegraph" or of the same speed.

Q. I will ask you the question, Captain, was this tender, exhibit "B" for a vessel, as near as it was possible to duplicate the "Telegraph"?

A. It was the idea of the bid; yes, sir.

Q. Both as to her hull and dimensions and her speed? A. Yes, sir; dimensions and speed.

Mr. MERRITT.—I renew my objection, for it appears on the face of the tender that it was not the same vessel as the "Telegraph."

(Paper marked Libelant's Exhibit "B," filed and returned herewith.)

Q. Captain, are you familiar with the depreciation in vessels of the character of the "Telegraph"?

A. Why, somewhat.

Q. Could you give an estimate as to what would be the depreciation in dollars and cents of the "Telegraph," the boat having been built in 1903, or were you familiar enough with the vessel to estimate it?

Mr. MERRITT.—I renew my objections.

A. I should not think the depreciation would be

(Testimony of Capt. H. B. Lovejoy.)

very much on a boat of that type, a boat well cared for.

Q. Was she well cared for?

A. The best of care. I have ridden on her many times. [75]

Q. For the purpose of arriving at some figures, how nearly could you approximate the depreciation either of the hull or machinery or house, or any other way that would be practical to you. I understand that you cannot make it exact.

A. Total or divided.

Q. Either way.

A. I should not think it was depreciated over fifteen per cent.

Q. That is in the total?      A. Yes, sir.

Mr. MERRITT.—I renew my objections to this line of testimony.

Q. Is there any market, Captain, for steamboats? Can you put them on the market the same as you can a horse?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and the witness has not shown himself qualified to testify.

A. No, you cannot.

Q. You have testified that you are familiar with the steamboat business on Puget Sound, haven't you?

A. Yes, sir.

Q. And particularly with that class of vessels?

A. Yes, we have one.

Q. You say there is not any market?

Mr. MERRITT.—I renew my last objections.

(Testimony of Capt. H. B. Lovejoy.)

A. I would not think there was any regular market for a boat. I can illustrate that about the "Vashonian"; that cost twenty thousand dollars and sold for something like thirty-five hundred dollars two years ago. The boat was worth the money, but they did not have a run for [76] her. I could not use her on my run, for instance, and I would not think you could figure on a market for a boat unless there was a place for it.

Q. That is part of the real value of a boat, whether there is a chance to use her. A. Yes, sir.

Q. Is a boat worth more to a man who owns her and a place to operate her than to a man who has no place?

Mr. MERRITT.—I object as calling for a conclusion and as incompetent, irrelevant and immaterial.

A. There is no question about that part of it.

Q. When a boiler that we will say has a life of fifteen years, has reached that age, is it worthless or what can be done with it—what is done to it?

A. A boiler in our boat is 23 years old. She was up for inspection last year, and they bored her and found the plate the same thickness as she was when she was built. She has run 22 years without any reduction in steam pressure.

Mr. MERRITT.—I move to strike the answer as irrelevant and immaterial and not responsive to the question.

Q. The question I am coming to is this, is the renewal of a boiler first in re-tubing, ordinarily?

(Testimony of Capt. H. B. Lovejoy.)

A. Ordinarily, yes. Of course, you have to take care of your boiler. The tubes are a small item of expense. We put new tubes in there at times.

Q. Does the shell outlast the tubes?

A. I think so, ordinarily.

Q. So that when you speak of the life of a boiler being fifteen years, you do not mean necessarily that the [77] boiler is worthless at the end of that time?

A. I should not think so; ours is not, in fact.

Mr. MERRITT.—I move to strike the answer as not responsive and for the reasons last stated.

Q. Do you know what the speed of the "Telegraph" was?

A. Why, I should think it was something better than twenty miles an hour; probably she could go twenty-one.

Q. That is her maximum speed? A. Yes, sir.

Q. Do you know what she traveled at ordinarily, what her regular running speed was?

A. On that run from 17 to 18 miles.

Q. Was she considered a very fast boat?

A. She certainly was.

#### Cross-examination.

Q. (Mr. MERRITT.) How long have you been in business on Puget Sound, Captain?

A. For myself?

Q. Yes.

A. About fourteen years, operating.

Q. Been connected with the Inland Transportation Company during that time?

(Testimony of Capt. H. B. Lovejoy.)

A. During the life of the company; that company is only six or seven years old.

A. I think so, ordinarily.

Q. What company were you with before that?

A. I used to own the steamer called the "Albion."

Q. Your business on Puget Sound has been that of operating steamboats.

A. I have built several, too. [78]

Q. Building and operating. A. Yes, sir.

Q. I suppose most of your business has been connected with the operating end of the business?

A. I served my time as ship carpenter and started with that and worked at it for quite a number of years.

Q. You are not engaged in the business of buying and selling of boats? A. No, sir.

Q. Now, this tender that was made for the construction of a stern-wheel steamer that has been offered in evidence here as Identification "B," did you have any written specifications upon which you based that tender?

A. No, I estimated that by comparison, principally.

Q. All you knew about the kind of a vessel that this tender called for was your general knowledge of the "Telegraph"? A. Yes, sir.

Q. And this was not intended as an absolute tender or agreement to build a vessel like the "Telegraph"?

A. It would be considered a pretty safe estimate?

Q. You intended to give it large enough so that you could build a vessel as you remembered the

(Testimony of Capt. H. B. Lovejoy.)

"Telegraph" was, no matter what the specifications proved to be?

A. Well, no, we will say it is subject to approval of the specifications.

Q. This was subject to approval of specifications.

A. Yes. It might be when I got the specifications that I would not build the boat for that money, and it might be lower, you could not tell. [79]

Q. For considerably less?

A. Well, no. I found really the best way to get at an estimate was by comparison. I built three boats for our company. If you come and asked me what I could build the boats for, I would not make out an itemized list of the different materials, but I would put my estimate upon what the boats I had built cost me as the safer way to estimate them.

Q. When you offer to build a boat like you have, you know pretty well what her hull cost and the house, and you have a pretty good idea as to what her engines and boilers cost and what her furnishings cost.

A. Pretty nearly; yes.

Q. This was simply a rough estimate of what in your opinion you could build a vessel like this, as you stated in your bid for, subject to the specifications that might be submitted to you?

A. Yes, sir.

Q. A further thing in this bid you guaranteed a speed of twenty miles an hour? A. Yes, sir.

Q. And it is a very difficult thing to build a stern-wheel steamer that will run twenty miles an hour, is it not? A. Yes, sir.

(Testimony of Capt. H. B. Lovejoy.)

Q. And in order to build one and guarantee that she will make that, you necessarily have got to increase your price, or your tender considerably, haven't you, you have got to have a margin?

A. Yes, sir.

Q. You have to put a considerable margin over that actual [80] cost of construction to cover that guarantee? A. Yes, sir.

Q. Well, now, about what would that be?

A. Well, from my experience, I would not say, I would not think you could duplicate that boat for less than eighty thousand dollars barring the guaranty.

Q. That is from your recollection of the "Telegraph"? A. Yes, sir.

Q. That is subject to inspection of the specifications of the "Telegraph"?

A. I am quite familiar with the "Telegraph."

Q. You are not sufficiently familiar so that you could now say or give an opinion as to the cost of her furnishings, for instance? A. No.

Q. Nor of the cost of her engines?

A. No, I could not segregate them.

Q. You cannot segregate any of these? A. No.

Q. And the cost, or the bid that you make on a vessel guaranteed to run twenty miles an hour, would be considerable more than one guaranteed—the same vessel guaranteed to run 18 miles, for instance? A. Some, yes.

Q. You spoke of the sale of the "Vashonian." That was the vessel that was sunk down here, was

(Testimony of Capt. H. B. Lovejoy.)

it not? A. Yes.

Q. She had been under water for sometime before she was raised? A. I believe so. [81]

Redirect Examination.

Q. (Mr. BRONSON.) Is a boat that will make 21 miles an hour or 20 miles an hour worth more money than one that makes 18?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Commands a better trade, don't she?

A. Yes, sir. I might say that if the "Vashonian" could have made twenty miles an hour she could have been sold for a good deal more money, but she could not make it.

Q. It costs money to make them go faster?

A. Yes, sir, just as Mr. Scott says, it costs a lot of brain work somewhere along the line.

Q. As a matter of fact, it costs money very rapidly to increase the speed of a boat?

A. Yes, sir.

Q. Mr. Merritt asked you for the figures and you said it was a rough estimate. Did you mean by that that it was a wild guess?

A. Nothing of the kind. I just estimated that by comparison, as I said.

Q. And you mean to say that is a fairly good and accurate estimate?

A. Fairly close. I think that is fairly close estimate. Might vary not to exceed five thousand dollars, I should think, on a detailed specification, and

(Testimony of Capt. H. B. Lovejoy.)

it might be either side of that. [82]

Q. (Mr. MERRITT.) But you made it so that there was not very much danger of it being on the side so that you would lose five thousand dollars?

A. Well, sure.

Q. And the increased cost of making a vessel run fast is largely a matter of brain work is it not, rather than a matter of dollars and cents?

A. Well, it puts a value in dollars and cents.

Q. I am talking about dollars and cents in the cost.

A. It costs a lot more money to get speed out of a boat any way they do it.

Q. It does not take any more lumber?

A. Takes more power.

Q. Takes a better engine and takes a better boiler? A. Yes, sir.

Q. Does not add anything to the cost of furnishings or equipment? A. No.

Q. (Mr. BRONSON.) How about the model. Does it take a finer model to make speed?

A. Well, there is where it takes the brain work.

Q. Captain, as a matter of fact, brain work is the highest priced labor that ever goes into a boat?

A. Yes.

Q. Many times over.

A. No question about that part of it.

Q. (Mr. MERRITT.) They charge not by results but by percentage of cost, don't they? [83]

A. Well—

Q. The architects all charge the same whether

(Testimony of Capt. H. B. Lovejoy.)

successful in designing a very fast boat or not?

A. Oh, there is a scale of percentage that they figure on.

Q. (Mr. BRONSON.) As a matter of fact, did you include any marine architect's fees in your figures?

A. No, I did not.

Q. You intended to do it yourself?

A. Yes, sir.

Q. (Mr. MERRITT.) That is you intended to draw the plans? A. Yes, sir.

Mr. MERRITT.—I move to strike the testimony of the witness as incompetent, irrelevant and immaterial and not furnishing any proper estimate of damages in this case, and also move to strike exhibit "B" for the same reasons.

(Testimony of witness closed.) [84]

[**Testimony of Joshua Green for Libelant.**]

JOSHUA GREEN, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. BRONSON.) Are you the President of the company that owned the "Telegraph"?

A. Yes, sir.

Q. Have you been engaged in steamboating, both building and operating, for the last fifteen or twenty years on Puget Sound? A. Yes, sir.

Q. Did you undertake to get estimates from steamboat builders on Puget Sound and Portland for the replacement of the "Telegraph" after she was sunk? A. Yes, sir.

Q. What range of prices did you get?

Mr. MERRITT.—I object as incompetent, irrele-

(Testimony of Joshua Green.)

vant and immaterial.

Q. I will ask you, first, did you specify the exact replacement of the "Telegraph" as nearly as it could be done?

A. Every time. I wanted to get an exact duplicate of the "Telegraph."

Q. What was the "Telegraph" Mr. Green, was she a fast boat or a slow boat?

A. She was a very fast stern-wheeler. She was the fastest stern-wheeler in the world; that has never been disputed.

Q. What range of prices did you get?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial. It is not the best evidence, and I object also for the reason that the specifications of that vessel for which these tenders were called, should be [85] offered in evidence.

A. The prices ranged, to cost us eighty to a hundred thousand dollars, for a steamer an exact duplicate of the "Telegraph," delivered in Seattle harbor.

Q. You include architect's fees?

A. I included the cost to us which if we have a builder to construct a steamer we would have to hire an architect in order to check up the builder. There is nobody in our company that is capable of doing that. We would have to hire a marine architect to check the builder and look out for our interests, and we have to hire an overseer to look out for our interests during the construction of a vessel, and the cost to us of a duplicate of the "Telegraph" would have been eighty to one hundred thousand dollars.

(Testimony of Joshua Green.)

Mr. MERRITT.—It is understood that this line of testimony is objected to on the same grounds as the other testimony of the same character.

Q. Did you ask for bids from a number of different people?

A. Yes, five or six. I asked for bids from all of the responsible builders in this section of the country.

Q. Now, are you familiar with the value of vessels like the "Telegraph"? A. Yes, sir.

Q. Is there a general market for vessels on Puget Sound or any other place?

A. No. A vessel is a liability if you haven't a route to put her on. She is far from an asset. She will cost you money to keep up. She makes no earnings unless you have a route for her. [86]

Mr. MERRITT.—I move to strike the answer as not responsive and as irrelevant and immaterial.

Q. Are you familiar with the value of a vessel like the "Telegraph," considering her age and general condition, at the time when she sank?

A. Yes, sir.

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial; not furnishing any proper basis for estimating damages in this case.

A. Her value was about eight thousand dollars.

Q. You would make an allowance for depreciation of the "Telegraph" as against a new vessel?

A. Yes, sir.

Q. About how much?

A. About fifteen per cent; twenty per cent at the outside.

(Testimony of Joshua Green.)

Q. Do you know what condition she was in?

A. Yes, sir.

Q. What condition was she in?

A. She was in excellent condition.

Q. How long previously had she been repaired generally or extensively?

A. The "Telegraph" had had new engines and a new shaft, practically new machinery, about three or four years ago. A year before she was sunk she had had a thorough overhauling on account of an accident. She had a new shaft and a new cylinder put in a year before she went down. We laid her up. We usually lay our stern-wheel boats up every winter. We had only taken her out about three weeks when she sunk. We had refitted her.

Q. By refitting what do you mean? [87]

A. I mean furnishings, carpets, curtains, water-coolers, pianos, knives and forks, china. These must be kept up on a passenger boat just as good as new. There is no boat we have that you go aboard of that the towels and appointments that the passengers come in contact with that are not as good as new; they must be. There was practically no depreciation in the fittings. Might have been five or ten per cent in the curtains or carpets or something like that. But the fittings were in excellent condition. The hull had depreciated some with age but it was in first rate shape, just as good to us as a new boat for operating, and I should say twenty per cent depreciation had taken place. Of course we repaired this, any depreciation that had

(Testimony of Joshua Green.)

taken place, and we covered that depreciation by repairs each year.

Mr. MERRITT.—I move to strike the answer as to the vessel being as good to them as a new vessel as irrelevant and immaterial.

Q. Is there any more economical way of building a vessel than to build it by contract, Mr. Green?

A. We have found that that is the most economical way to build it.

Q. Could you go to work, for instance, and build a vessel exactly like the "Telegraph" for less money than you could get other people to contract to build her for you?

Mr. MERRITT.—I renew my last objection.

A. No, we could not build it as cheap. [88]

#### Cross-examination.

Q. (Mr. MERRITT.) You say she had been refitted, Mr. Green? A. Yes, sir.

Q. How long previous to the accident?

A. About three weeks.

Q. Do you know what new fittings had been put into her? A. Yes, sir.

Q. What were they?

A. The steamer had been laid up during the winter months as usual, our stern-wheel steamers are usually laid up, and when we took her out we put in everything that was necessary to make her fit, just as good as new. There were many things, changing plush on the seats—

Q. Did you put in new plush on the seats?

A. We put in new plush on many seats.

(Testimony of Joshua Green.)

Q. How many of them?

A. I could not tell you.

Q. Who did that work?

A. Our company here, we have our own upholsterers, but sometimes we do it by contract.

Q. Who did it in this case?

A. I could not tell you without looking at the books.

Q. Do you know what the cost was?

A. I could not tell you offhand.

Q. In fact, it was simply going over and repairing breaks and such things as that. You do not mean to say you replushed these seats except where there might be a break or something of that kind?

A. I mean to say we made her as attractive and her fittings as comfortable as they would be if new. We expect to do [89] fitting for the passenger service.

Q. I say that don't mean to put new plush on all the seats? A. No.

Q. Simply patch up and put in new where it had been worn and torn?

A. Covering up the worn parts.

Q. You could not say to what extent that was necessary nor what it cost?

A. No. I could not say. The wear and tear may be more some years than others, but we replace that wear and tear each year.

Q. Wherever it gets a little too bad you replace it.

A. Whenever it gets to looking bad we fit it up to look attractive.

(Testimony of Joshua Green.)

Q. What other things did you put in?

A. Took the boat out on the drydock and painted her bottom and repaired any little place in the hull that might be bad.

Q. Who did that work? A. Our company.

Q. What dock did you take her out on?

A. I could not say this year. I think it was the Moran company of Seattle. We had them out each year. I do not just remember where it was done.

Q. Or what the expense was.

A. No. But it is always done. There are several dry docks and we always take them out just as well as they can be made.

Q. You have no recollection yourself which dock did this work this year? [90]

A. No, I could not say. We have had her out at different times on all the docks in this section.

Q. Then you do not know what the cost of that work was?

A. No, I could not tell you exactly. I could look over our company books and tell you.

Q. What else did you have done?

A. That was all that was done to the boat. She was simply put in excellent condition for the passenger business, three weeks before she was sunk.

Q. When you speak about new pianos, you do not mean to say that you put in a new piano?

A. I do not know whether we did this year, but when a piano wears out we put in a new one.

Q. You do not know whether you did this year?

A. I do not know what fittings were put in.

(Testimony of Joshua Green.)

Q. Did she have a piano on? A. Yes, sir.

Q. Do you know how old it was?

A. No, I could not tell you.

Q. Do you know what kind of a piano it was?

A. No, but it was in excellent condition for the passenger service.

Q. The idea was, Mr. Green, that you renewed the linen and tableware and other fittings of that kind, but you did not go through and refit her entirely?

A. Oh, no. We covered up the worn chairs.

Q. That is necessary to be done all the time.

A. Must be done in the passenger service, so that the depreciation in that regard was nothing.

Q. All that was done this spring to take her out?

[91]

A. All that was necessary to be done was done.

Q. When you spoke about her value as eighty thousand dollars, you meant she was worth as much to you as a new boat, that is what it would cost to get a new boat?

A. Yes, sir, she was worth that to us, for this reason, the "Telegraph" was very fast. When we have opposition on any of our runs we need an implement like the "Telegraph" to offset the opposition. We can beat any other steamer that comes against us with the "Telegraph." We used her for that and she is valuable for that purpose.

Q. She was valuable on certain routes?

A. Valuable on all our routes, inside routes, for all steamboat purposes.

Q. You did use her on some routes and take her

(Testimony of Joshua Green.)

off because it was not profitable to run there?

A. No, used her on many routes to regain the route. We used her on the Bremerton route and run our competitors off.

Q. You used her on the Paulsbo route and found that she was not practicable to use there?

A. We used her there until we broke our competitors and then took her off.

Q. You took her off before that, didn't you? You took her off there because the "Teelgraph" could not operate on Liberty bay?

A. I think we did in that instance. We used the "Telegraph" there for a while, and we found that there was very shallow water there and she did not handle very well and we put on another boat. We have two or three boats of that style to be used for that purpose. [92]

Q. She is not a boat that would be a practicable boat to go on all routes around the Sound?

A. Yes, on all inside routes as a passenger carrier; she is not a freighter. She is no account to go beyond Port Townsend or in the straits of Fuca.

Q. You bought her the year of the Fair, 1909?

A. No, we bought her about three months before the Everett "Interurban" began operating between Seattle and Everett. That was after the Fair.

Q. It was during—

A. Quite a while after the Fair; a year or two after the Fair.

Q. It could not have been a year or two after the Fair. It could not have been two years.

(Testimony of Joshua Green.)

A. Well, it was a long time after the Fair, I know.

Q. You have owned her over two years, haven't you?

A. The Fair was in 1909. We bought her about a year after the Fair.

Q. And continued to operate her on the Everett-Seattle run for a while? A. Yes, sir.

Q. And then took her off and put her on these opposition runs that you speak of, where you had a fight on.

A. We were using her on all our inside routes. In fact, the Everett route has been very unprofitable since the "Interurban" began to operate, and we have used the cheapest steamer we could get to operate there.

Mr. MERRITT.—I move to strike the answer as irrelevant and immaterial.

Q. In this proposed new boat that you speak of, you included [93] of course, architects' fees?

A. Yes, sir, as our cost; we have to have them.

Q. These calls for tenders or bids, that you sent out were all based on a guaranty of twenty miles an hour were they not? A. Yes, sir.

Q. And you say the "Telegraph" was the fastest stern-wheeler in the world? A. Yes, sir.

Q. In other words, with all the stern-wheelers that have been built and built for speed many of them, no one has been as successful before as Captain Scott in getting such a fast vessel for them?

A. No one has devoted the money and time to details as Captain Scott did in the "Telegraph."

(Testimony of Joshua Green.)

Q. They never succeeded in getting as fast a vessel? A. They never got the results that he got.

Q. When you called for a vessel of the same speed as the "Telegraph," you were calling for something that might be almost impossible to get, were you not?

A. Calling for something that was as valuable to us as the "Telegraph" had been.

Q. I say, you were calling for something that might have been almost impossible to get, for no one had ever succeeded in getting as fast a vessel.

A. It could be gotten.

Q. Never had been?

A. Never had before. Before steamboat building had been cruder, but it is getting to be more of a certainty every day. [94]

Q. But you called for a guaranty of a speed of twenty miles? A. Yes, sir.

Q. That meant a sustained speed? A. No.

Q. Simply a trial trip speed?

A. That meant a speed that we could operate at 18 miles and an extreme speed of twenty and a little over like the "Telegraph" that we could use when we wanted it against our opposition.

Q. A speed she could sustain if she needed to?

A. Yes, sir.

Q. Did you send specifications of the "Telegraph" to these various parties that you called for bids from?

A. No, they were all familiar with the "Telegraph"; she is a very well-known boat.

(Testimony of Joshua Green.)

Q. All they knew about the vessel that they were bidding on, then, was simply their general knowledge of the "Telegraph"?

A. All these bidders had traveled on the "Telegraph"; they knew of her performance and they all went aboard of her after she was raised, and could get exactly the dimensions and proportions, sizes and conditions in every way.

Q. You say all these bidders went aboard of her?

A. Yes, sir. She is in the harbor of Seattle now in a wrecked condition.

Q. And was in that condition when they went aboard of her?

A. Yes. But they could tell exactly the dimensions and proportions. They would have no trouble in duplicating her. You have to go to intelligent bidders; you cannot go to Tom, Dick and Henry for that to duplicate her.

Q. Among other bidders you got a bid from Supple of Portland? [95] A. Yes, sir.

Q. About sixty-eight thousand dollars?

A. To be delivered in Portland for \$72,500. I think I have that tender in my pocket. That is the lowest bid. If we would add to that five per cent for architect's fees and superintendence of the vessel on behalf of the owners to look out for the owner's interest while being built, and take it from Portland to Seattle, why that bid would run—I think I figured eighty thousand dollars. But by itself it is \$72,500.

Q. Have you that bid with you? A. Yes, sir.

(Testimony of Joshua Green.)

Q. Produce it.

A. Here it is. I figured Supple would lose money on that boat.

Mr. MERRITT.—I move to strike the answer as not responsive to the question and as irrelevant and immaterial.

Mr. MERRITT.—I ask the witness to produce the bids referred to and offer them in evidence.

Mr. BRONSON.—I have no objection.

(Papers produced and marked Claimant's Exhibits "1," "2," "3," "4" and "5," filed and returned herewith.)

A. (Continuing.) The lowest bid is Supple's, and the highest I consider is Heffernen's. Heffernen did not figure on fittings; the highest bid I figure is the Seattle Drydock and Construction Company.

Q. Did you have any other bid from Supple than this?

A. None whatever. These are the only bids I got, and these are all the reliable ones in the northwest.

[96]

Q. Didn't you have a bid from Supple without the guaranty of speed?

A. No, none whatever. Supple was approached on the "Telegraph" to give bids to some other parties, so he told me. He explained he would have to look at the boat to get the data and everything. He looked at the boat and got the data and everything and gave this bid.

Q. You had the vessel insured?

A. Not at the time she sank.

(Testimony of Joshua Green.)

Q. You have had her previously?

A. Yes, sir.

Q. What was the value for insurance purposes?

Mr. BRONSON.—I object as incompetent, irrelevant and immaterial, not the proper basis for estimating the value of the boat, as it is a well-known fact that vessels are very often insured for very small proportions of their value.

A. Our insurance rates had been going up for the last three years, and we had been reducing our values that we insured on for economy, and I think the last year we had the "Telegraph" insured it was somewhere near thirty thousand dollars—in fact \$27,500.

Q. That is about what it was, \$27,500?

A. Something in that neighborhood.

Q. That was the value for insurance, the value for insurance purposes? A. For insurance purposes.

Q. You did not carry any of that insurance?

A. We did not carry insurance ourselves. We were putting the valuation on every boat very low then because we did [97] not want to pay the expense of full insurance.

Q. It would not cost any more if you valued her right and carried part of the insurance yourselves?

A. Yes, if we carried part of it ourselves and the boat was lost we would have to stand our share of that.

Q. You would have to stand what you did not get from the insurance companies? A. Yes, sir.

Q. That would be true whether she was full value or half value.

(Testimony of Joshua Green.)

A. There is a difference between the real value of the boat and the amount of insurance put on her.

Q. But you can only collect the amount of insurance in case of total loss? A. Yes, sir.

Q. And that is the value that had been placed on her for some little time?

A. For insurance purposes only. We were very well satisfied to get the insurance companies to accept that low valuation, and we would have let her lower if we could. We have no insurance now whatever, the rate is so high we cannot afford to carry it.

Mr. MERRITT.—I move to strike the answer as not responsive and as irrelevant and immaterial.

Q. You heard Captain Scott's testimony as to the purchase price of this vessel? A. Yes, sir.

Q. That was correct?

A. The actual dollars and cents that we paid was \$55,000 cash. We had been trying to buy these steamers—

Mr. MERRITT.—I object to the witness testifying further, he [98] answered the question.

Q. With these boats you got the route on which they were being operated?

A. Yes, sir, and the route was a liability. The "Interurban" began to operate three months afterwards and the route was a loser, a heavy loser. Captain Scott knew it. That is one reason for selling, he had no other route to put them on.

Q. He did not take advantage of you in that knowledge, did he? A. Not a bit.

(Testimony of Joshua Green.)

Q. You knew the "Interurban" was being built and was going into operation shortly after you got them—

A. And we made him believe that it would make him lose a lot of money in order to make him sell the boats cheap.

Q. As a matter of fact, it did not have that effect on the route, did it?

A. As a matter of fact, it did; it injured the route immensely.

Q. You fooled yourself as well as the Captain?

A. Well, not as badly as we did the Captain, I don't think.

Q. You continued to operate the vessels on that route ever since?

A. Ever since. We are going to hold that route. In years to come the route will be valuable. That was the history of the Tacoma route. When the "Interurban" went on the Tacoma route the "Flyer" lost money, but they continued to operate for two or three years and made the route valuable and we felt that the same condition would exist at Everett. [99]

Q. (Mr. BRONSON.) You may go ahead, Mr. Green, and state what the conditions were with reference to the purchase there that counsel objected to in putting in his own testimony.

A. Captain Scott was getting to be a very old man; he was getting in his dotage. I am sorry to say I think the old gentlemen is failing a good deal. He had two boys and one was a little wild and he did

(Testimony of Joshua Green.)

not want to turn over the steamboat business to them.

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, also as hearsay and not responsive to the question.

Q. Go ahead and state briefly.

A. He did not want to turn the business over to these boys. He wanted to put them out on farms. He wanted to get as much cash for the route as he could, and the "Interurban" was shortly going to run. He was making a good profit on it then, and he had an excellent boat in the "Telegraph." And in the "Everett" he had a boat that was out of date and not very fast, practically worthless to us, we considered her and the route worth nothing. What we paid him was for the "Telegraph." We bought the "Telegraph" and we considered that we got her very cheap, and we took advantage of the conditions that existed, an old gentleman wanting to retire from business and discouraged on account of the "Interurban" going to parallel his route, and one of his boys not being fit to turn out on his own responsibility without the father to overlook him, he wanted to get his boys where they could take care of themselves, and the only safe and possible place was on a farm, and so he bought a farm for them. He had no other routes at all for his boats and he knew if he undertook to oppose [100] anybody else and get their routes, that he was an old man and he probably could not succeed, and so he got as much money as he could which he said was very

(Testimony of Joshua Green.)

much less than the boats were worth.

Q. (Mr. MERRITT.) He did not put all the boys on the farm, did he? A. He did at first.

Q. One went to work for you?

A. No, one of them went out on the farm.

Q. And the other one went to work for you?

A. One worked with us for awhile. He went to the farm and then got tired and then went to work on the "City." The wild one is still on the farm and the old man is down there with him.

Q. You figured that he simply threw in the route and the "Everett City"?

A. He is glad to get rid of it. We figured that we paid nothing for this one; we would pay nothing for that.

Q. She has been operating to Everett most of the time since? A. Oh, no, just spasmodically.

(Testimony of witness closed.)

Hearing adjourned until August 14, 1912. [101]

Seattle, Washington, August 14, 1912.

Present: Mr. BRONSON, for the Libelant.

Mr. MERRITT, for the Claimant.

[**Testimony of W. S. Matthewson, for Libelant  
(Recalled).]**

W. S. MATTHEWSON, recalled for further cross-examination.

Q. (Mr. MERRITT.) Mr. Matthewson, you were asked the other day to produce the specifications which you had of the "Telegraph," or parts of the "Telegraph," and upon which the bid of the Seattle

(Testimony of W. S. Matthewson.)

Construction & Drydock Company, that has been offered in evidence, was based. Can you produce such specifications as you had?

A. I have them, in conjunction with the specifications you have there (exhibit "A").

Q. I ask to have this paper produced by the witness marked.

(Paper marked Claimant's Exhibit "6" for identification.) The number of typewritten sheets fastened together and marked for identification "6" are the specifications you referred to in your testimony?

A. Yes, sir.

Q. These specifications are specifications submitted to the Seattle Construction & Drydock Company for the repairs of the steamer "Telegraph," are they not? A. They are.

Q. These cover all repairs necessary to put the vessel back in the shape she was before she was sunk, except the equipment? A. Yes, sir.

Q. These do not purport to be the specifications of the vessel herself, of course? [102]

A. I understood these were specifications of the vessel. They were the specifications submitted for the purpose of making the repairs to put the ship back in the same shape she was before.

Q. But they do not purport to be specifications of the vessel but for repairs?

A. That is what it is entitled for repairs.

Q. These specifications marked "6" for identification are, then, the only specifications that you figured upon and upon which this bid was made?

(Testimony of W. S. Matthewson.)

A. The only specifications; yes, sir.

Q. All that you had on which to base that bid, except what you remembered of the vessel from an inspection that you made of her as you testified the other day? A. The notes; yes, sir.

Mr. BRONSON.—He has some notes or a book or something.

A. No, the notes were transferred to my estimate.

Q. The notes you refer to now are simply these that are contained in the bid which has been offered in evidence as Libelant's Exhibit "A"?

A. So far as the machinery—

Q. What other notes have you got?

A. Of the hull. I took a memorandum of the scantlings and the spacing of the frames, and the thicknesses of the planks above the water, and the ceiling construction.

Q. When did you take that?

A. At the time I was down there to make the examination for repairs.

Q. That was after the vessel had been raised?

A. Yes, sir. [103]

Q. Have you got those notes?

A. I haven't got them with me.

Q. What other memoranda have you, if any, outside of your recollection? A. That constitutes it.

Q. That constitutes all. That memoranda of the hull is simply as to the measurements of the hull and scantlings.

A. That is all that was necessary to make an estimate of the hull.

(Testimony of W. S. Matthewson.)

Mr. MERRITT.—I offer now identification 6 in evidence, with the privilege of having a copy substituted so that I may return this to the witness.

Mr. BRONSON.—We have no objection.

(Paper marked Claimant's Exhibit "6," filed and returned herewith.)

Q. I ask you, Mr. Matthewson, if this tender, Libelant's Exhibit "A," for the construction of this vessel mentioned in the tender, included a guaranty of twenty miles an hour.

A. Equal in all respects to the steamer "Telegraph."

Q. Did you understand that you would have to guarantee a speed of twenty miles an hour?

A. Why, no, I cannot say that I did. The machinery would be the same as what is in her. It would be a duplicate of the machinery at present in the boat.

Q. Did you have any letter from Mr. Green asking your company to make a tender for this vessel?

A. I cannot say that I did see a letter from him. The information I had was the specifications of the machinery and that was turned over to me with the request to prepare [104] an estimate based on that specification. I did not see the letter requesting it.

Q. Did you make up these figures of \$92,400?

A. I made up the estimate of the cost.

Q. Then you did not make up the figures that were finally submitted here by Mr. Patterson?

A. From which the figure was submitted.

(Testimony of W. S. Matthewson.)

Q. Then you did not make that figure up, that \$92,400? A. I did not.

Q. The estimated cost you made up was not \$92,-400? A. No.

Q. What was the estimate that you made?

A. I haven't in mind just what it was now.

Q. Can you tell about how much it was?

A. No, I could not; it would be memory. I did not look that up recently.

Q. Well, could you say whether it was within five or ten thousand dollars, more or less, of these figures?

A. I might explain here that the estimate that I made is for actual money expended, irrespective of what may be involved in the overhead. I make up an estimate for cost in money expended.

Q. That is what it actually costs your company to construct a vessel exclusive of overhead?

A. Yes, sir.

Q. And exclusive of profit and all that?

A. Yes, sir.

Q. So that the figures that you made did not include any of the overhead or profit or anything that might have been included in the bid on account of any guaranty [105] that might have been called for? A. Exactly.

Q. And cannot you give me approximately the figure that you made up?

A. I would be trusting to nothing but memory, for I average about 10 or 15 estimates a day. It is a considerable time since then, but I should say

(Testimony of W. S. Matthewson.)

somewhere—if you insist on an answer as to an approximate figure—

Q. As near as you can get at it.

A. I should say somewhere between sixty-five and seventy thousand dollars; that is from memory.

Q. How would you divide that between the hull and house, on the one part, and the machinery and boilers another and the equipment and fittings another? How much would you say would be the cost of the hull?

A. Well, it would be a question of memory again, and I do not see that it would be of much value to the Court.

Q. I ask you how you did it, as near as you can remember?

A. I make up the estimate *in toto*; that is, the cost is carried right through on each item.

Q. I understand, but you had to estimate what the hull and house would be?

A. Oh, not necessarily so. I make up an estimate of the aggregate and that is carried into the totals. We do not segregate that.

Q. You have had sufficient experience, haven't you, in making up estimates, so that you could now express an opinion as to what the cost of the hull and house would be of a vessel like the "Telegraph"?

A. I do not pretend to carry this in my head. There are [106] so many different items involved, and I say they are carried on in the aggregate into the end of the total estimate, so that un-

(Testimony of W. S. Matthewson.)

less the estimate was made up on each item that way I do not see how I could give it.

Q. Do you mean to say that you cannot remember whether the cost you figured, the cost of the hull and house at fifteen thousand or twenty-five thousand dollars, or some other figure?

A. I do say I cannot remember that because there were probably a dozen or twenty sheets of that estimate and they are not totaled until the final total is made. There is no object in segregating it into items, in as much as it is for a total boat, and therefore there was no total made of individual items.

Q. You know what the cost of the engines would be, don't you? A. Not from memory.

Q. Could not give any idea at all?

A. I could give you an idea but as I say it is trusting to memory.

Q. Give your idea.

Mr. BRONSON.—I object. The witness is asked to guess. He acknowledges that he can only make a guess and I submit that that will not enlighten the Court, and it can have no value to either side of the case.

Q. I want his best recollection of the cost of the engines. He certainly can give somewhere near what he estimated the cost of the engines.

A. No, I do not look at an estimate as an engine costing so much money. I do not treat the estimate in that way. [107]

Q. You do put down in the estimate that the engines cost so much money?

(Testimony of W. S. Matthewson.)

A. The individual parts.

Q. And you haven't sufficient familiarity with engines and the cost of engines and its different parts, so that you could now say approximately what the total of these parts were as you estimated them?

A. I could guess at it but that is what it would be.

Q. I am not asking for exact figures. Did it amount to ten thousand dollars, the aggregate price of the engine as you estimated its cost?

A. Why, I should not think so.

Q. Now, about the boiler. Can you say now about what you estimated the cost of the boiler?

A. Well, that would be entirely from memory. I should say somewhere between nine and twelve thousand dollars.

Q. You think a boiler of that kind would cost the company between nine and twelve thousand dollars?

A. Yes, sir.

Q. Now, about the equipment?

A. I would not venture an estimate on that.

Q. You could not say anything about that?

A. I would not venture an estimate on that.

Q. And you haven't sufficient knowledge of the cost of the construction of the hull and house, like the "Telegraph's," so that you could say approximately what you estimated the cost of the hull and house to be.    A. No, I would not.

Q. Would you say it would exceed twenty thousand dollars?    A. For the hull and house? [108]

Q. Yes, sir.    A. It surely would.

Q. Would you say it would exceed twenty-five

(Testimony of W. S. Matthewson.)  
thousand dollars, as you estimated it?

A. I prefer not to answer that.

Q. I call for an answer. I am entitled to know whether you think it would exceed twenty-five thousand dollars.

Mr. BRONSON.—Of course, this is all subject to our objection that counsel has proceeded along a line of evidence which on the face of it is not enlightening to the Court or parties. The witness says he has no present recollection of the totals that went to make up the total on which the estimate was made. He simply made the estimates for someone else. This is simply an attempt to reflect upon the value of the evidence in a way which I do not think is legitimate.

Mr. MERRITT.—He is offered as an expert witness in making up estimates of the cost of vessels of this type.

Mr. BRONSON.—He is not offered here as an expert witness who carries the cost of every nut and bolt in his head.

Mr. MERRITT.—He is not asked to do that. He is asked as an expert whether the hull and house would cost twenty-five thousand or fifteen thousand or thirty thousand.

Mr. BRONSON.—He said it would be over twenty thousand dollars.

Q. Would it be over twenty-five thousand dollars?

A. I think it would be over twenty-five thousand dollars.

Q. Do you think it would be over thirty thousand dollars?

(Testimony of W. S. Matthewson.)

A. If you want to know what I guess at that cost, without my seeing my notes, or knowing definitely, I should say that those two items would be between thirty and forty [109] thousand dollars.

Q. Then your opinion now, or your recollection now is in making up these estimates upon which this tender was made you estimated the cost of the hull and house as somewhere between thirty and forty thousand dollars?

Mr. BRONSON.—I object to that form of question, because the witness said expressly he did not recollect, and declined to express his recollection. Counsel is asking the witness to give a guess. He testified as to what the total figures of his estimate were, and says he has no recollection of the items.

A. Why, I stated, if you asked me to make a guess at this time, that it was between thirty and forty thousand dollars.

Q. Is that your recollection of the estimate that you did make up?

A. Now, your Honor, as I said, I did not look at these figures recently and I do not feel justified in trying to recollect these figures.

Q. Then you cannot recall the total, even?

A. No.

Q. And you do not know what elements, outside of the estimate that you furnished, went into this tender which Mr. Patterson made, and which has been offered in evidence here, as to the amount of profit he added?

Mr. BRONSON.—He has so stated.

(Testimony of W. S. Matthewson.)

A. No.

Q. Did you make up the estimate for a bid for making repairs to the vessel, based on these specifications marked exhibit "6"? A. I did. [110]

Q. What was the amount of that estimate?

A. That I have no recollection at all at present.

Q. Cannot remember anything about that?

A. No.

Q. I will ask you if it was not twenty-three thousand dollars.

A. As a rule, I do not see the figures that go in. That is taken care of by the manager of sales for the present company. As I said, the part which I took is to prepare the flat cost.

Q. So you do not know anything about what that tender was? A. Well, I do know approximately.

Q. Well, was it not twenty-three thousand dollars?

A. Somewhere between twenty and twenty-five thousand dollars; that is my memory.

Q. Under twenty-five thousand dollars, anyway?

A. From my memory, I think it was.

#### Redirect Examination.

Q. (Mr. BRONSON.) Mr. Matthewson, with regard to the question of the estimate which was made for repairing the vessel, it was without respect to how good a vessel she would be, as compared with what she was before. It would be simply to repair certain damages to the vessel?

A. That estimate as based upon the specifications submitted.

(Testimony of W. S. Matthewson.)

Q. To do certain things, was that it?

A. Conform to the specifications.

Q. The specifications which have been marked exhibit "6"? [111]

Q. And has no reference to any other result than the doing of the things that these specifications call for?

A. Well, on the face of it, yes. It is presumed that that would be a bid under the specifications to make repairs to the house which was damaged, and the underwriters would be obliged to put her in the same shape.

Q. But the bid that is called for in these specifications would not necessarily make her the same boat she was before, they might or might not, in a given case?

A. Well as I answered before, it is presumed that those specifications would make her in the same shape she was originally. It might be they would read somewhat different.

Q. Would you be concerned under such a bid as that with doing anything other than exactly what the specifications called for? A. No.

Q. And if the specifications did not make the boat as good as she was before, of course you would not be concerned in that? A. No.

Q. In other words, you would govern yourself by the specifications entirely? A. Yes, sir.

Q. Now, in all of these estimates you make, you have explained that it is simply the cost to the Seattle Drydock and Construction Company of the

(Testimony of W. S. Matthewson.)

material and labor that goes into these particular specifications? A. Yes, sir.

Q. In addition to that the company figures upon making a [112] reasonable profit upon the work?

A. Yes, sir.

Q. In addition to that there are certain other costs in the nature of what is called overhead expenses, which are taken care of by another department? A. Yes, sir.

Q. And these are very considerable sums in a plant like that?

Mr. MERRITT.—I object. The witness has not shown himself competent to testify as to these charges.

Q. How large a plant is the Seattle Drydock & Construction Company?

A. The number of men employed?

Q. Yes, roughly.

A. A thousand men, I should say.

Q. And covers something like 18 acres of ground, does it not? A. The plant is pretty well known.

Q. That overhead expense has to take care of the taxes and insurance on all that property?

A. That end of it I am not familiar with, that is out of my department.

Q. You know as a matter of fact that it does include a large expense of that kind?

A. I would infer it does. That is my understanding of overhead expenses.

Q. Now, in building another vessel like the "Telegraph," all you need, so far as the specifications of

(Testimony of W. S. Matthewson.)

the ship are concerned, besides her dimensions, I mean the hull and house in talking about her dimensions, a cross section [113] etc?

A. In the way of specifications?

Q. Yes, sir.

A. That would be sufficient data, specifications of the amidship section.

Q. These specifications marked Claimant's Exhibit "6" cover only a part of the vessel, don't they?

A. They do.

Q. And do not cover all?      A. No.

Mr. MERRITT.—I move to strike out the evidence of the witness and also Libelant's Exhibit "A," as incompetent, irrelevant and immaterial, and not furnishing any proper basis for estimating the damages in this case. And for the further reason that the testimony of the witness shows that he did not have any specifications or sufficient data or information relative to the "Telegraph" to make an estimate of the cost of reproducing a vessel of that kind. And, as it appears that the tender that was made was not based on figures that the witness made up, or estimates that he made up, but included other items, and there is no evidence in the case to show what values the other items were, or what was intended to be included in this estimate, or upon what basis the bid was made.

(Testimony of witness closed.) [114]

[Testimony of Joshua Green, for Libelant  
(Recalled).]

Mr. JOSHUA GREEN, recalled on behalf of the libelant, testified as follows:

Q. (Mr. BRONSON.) I will ask you, Mr. Green, if Libelant's Exhibit "A," purporting to be a tender or bid from the Seattle Construction & Drydock Company, was one which you obtained from the company through Mr. Patterson, the General Manager, for rebuilding a vessel similar or a duplicate of the "Telegraph," as nearly as it could be made?

Mr. MERRITT.—I renew my general objection to this line of evidence.

A. Yes, sir.

Cross-Examination.

Q. (Mr. MERRITT.) Did you make a written request of Mr. Patterson for this tender?

A. I do not think I did. I saw all the bidders personally. I believe I may have written some of them.

Q. As you stated the other day, all of these bids, including this one of the Seattle Construction & Drydock Company, were required to be made with the guaranty of twenty miles an hour of the vessel to be constructed?

A. They were required to duplicate the "Telegraph," and that was the "Telegraph's" speed.

Q. That was the understanding that they were to guarantee a speed of twenty miles an hour?

A. Yes, sir.

(Testimony of Joshua Green.)

Q. And that is true of the Seattle Construction & Drydock Company?     A. Yes, sir. [115]

Redirect Examination.

Q. (Mr. BRONSON.) So that we do not have any misunderstanding in the record, was this vessel that you called for from these various bidders to duplicate the "Telegraph's" speed, assuming the "Telegraph's" maximum speed was twenty miles an hour, to sustain a running power of twenty miles an hour, or was it to be a duplication of the "Telegraph" as to what she could do, or was it to be a sustained speed of twenty miles, irrespective of what she could do?

A. It was to be a vessel of extreme speed of twenty miles an hour, and to give the same performance that the "Telegraph" was giving. We never ran the "Telegraph" at twenty miles an hour on her commercial speed; we ran her about 18 miles.

Q. Well, is it the custom to run a vessel at her maximum speed, which the builder guarantees to make as a steady operation?

A. You never run a vessel at her trial speed, which is the maximum speed. But it is necessary to have a high, extreme speed, especially on Puget Sound, as you know in case of opposition on your routes with other vessels, you have to use extreme speed at times but you do not use it in your regular commercial run.

Q. (Mr. MERRITT.) You say you never did run the "Telegraph" twenty miles an hour?

A. Yes, sir; we have.

(Testimony of Joshua Green.)

Q. You have run her twenty miles an hour?

A. Yes, sir. [116].

Q. Were you on her at the time?

A. No, I do not go on the vessels very much.

Q. Then you never run her over any course to test her speed?

A. No, but I have run her against other vessels.

Q. So all you know about whether she did run at twenty miles an hour is information from some one else as expressed to you.

A. Well, we know that she beat the other vessels, and she had an extreme speed in her to do it, and she was valuable to us for that reason.

Q. And that had been reported to you by others that it was twenty miles an hour.

A. I have seen her come into the dock ahead of the other vessel.

Q. That is all you know about whether she could make twenty miles or nineteen and a half.

A. I have seen her ahead of the other vessels coming into the dock.

Q. But in the vessel that you are assuming to have built they had to guarantee that she could make twenty miles, and if necessary to maintain twenty miles?

A. I explained to these shipbuilders what the "Telegraph" could do. Most of them knew what she could do, and I told them I wanted a vessel the exact duplicate, and they all understood what an exact duplicate was, a vessel that could give that performance, and they were all bidding on it I am sure.

(Testimony of Joshua Green.)

Q. They were all bidding on the supposition that the "Telegraph" could maintain a speed of twenty miles an hour [117] and sustain it?

A. Yes, sir.

Q. And that was the kind of a vessel that they were required to build?

A. Yes. And in other boats bidders on the "Telegraph" were to duplicate the "Telegraph." Duplicate her power and duplicate her hull, and in every way be a duplicate. They never bid on any handsomer or larger or more powerful vessel.

Q. And whether she was more powerful or not, she was required to make that twenty miles?

A. Yes. I will make this point, if you want me to explain it.

Q. I think I understand it.

Q. (Mr. BRONSON.) Go ahead and explain.

A. In building a boat for extreme speed like the "Telegraph," you get your boat out and you make your trial trip. You nearly always find in order to get this extreme speed that you have to make some alterations. These are some of the things that go into responsible bids in making speed. In many cases you will find on stern-wheel boats, you have to change your rudder. In many cases you will find that the wheel is too deep in the water and you have got to raise the wheel in order to get just exactly the right dip in the water. In many cases you will find that the stern of the boat is too close to the wheel. Probably have to make a smaller wheel if the stern comes too close, and the wheel comes too

(Testimony of Joshua Green.)

close to the hull of the vessel why that detracts from [118] her speed. And in getting a boat of extreme speed, you have got to do some remodeling. I don't care if you build an exact duplicate of another boat, and you figure on getting the highest possible speed, you have got to do a little remodeling in order to get it. All your builders understand that and I think they figure on that. And I have no doubt in the case of the "Telegraph," Captain Scott had to undertake a great many things of that kind, change his rudders, change the distance of the wheel from the hull. And you have to do the same thing in propeller boats. You may put on one propeller and figure that it will give you the highest speed to your steamer and you will find that you have to have half a dozen propeller wheels cast before you get one that is practicable and gives the best results.

Q. All these things go to make high speed very much more expensive to construct? A. Yes, sir.

Q. A boat of a speed of twenty miles is a great deal more expensive than 18 or 19? A. Yes, sir.

Q. Any additional mile makes a great deal of additional expense? A. Yes, sir.

(Testimony of witness closed.) [119]

[Testimony of L. Simen, for Libelant (Recalled).]

Mr. L. SIMEN recalled for further cross-examination.

Q. (Mr. MERRITT.) Do you have the specifications on which you prepared the estimate for the bid made by the Heffernen Engine Works?

(Testimony of L. Simen.)

A. I went aboard and took some notes of the general construction of the ship, and then used these notes and the drawings that we had on file of the "Telegraph" showing her—

Q. What drawings did you have on file?

A. Some drawings submitted at the time of the repair work.

Q. Drawings of the vessel?    A. Yes, sir.

Q. Submitted by the surveyors?

A. Yes, sir. And they were checked up at that time when the repair work was under way.

Q. What do these drawings consist of? Were they drawings of the vessel?

A. Of the general arrangement of the vessel.

Q. General arrangement?

A. Yes, sir. Giving the size of the house and all that sort of thing. The specifications that we had at that time were our own specifications of the joiner work, upper work of the vessel.

Q. The specifications that you refer to were specifications for the repair work?    A. Yes, sir.

Q. And they were the same that have been introduced in evidence here as Claimant's Exhibit "6"?

A. I do not know whether they are or not. [120]

Q. Did you see them?    A. Which ones?

Q. The specifications that you refer to?

A. I seen them and worked on them.

Q. Could you tell by looking over this exhibit "6" whether they were the same?

A. Not unless I compared them.

Q. But they look to be the same?

(Testimony of L. Simen.)

A. Yes, I have no doubt they are.

Q. Submitted by the surveyor of the vessel there for repairs? A. Yes, sir.

Q. And these with the notes you had made and these drawings with what you had, to base your estimate of the cost of reproducing or building this vessel that Mr. Green called for? A. Correct.

Q. Now, how extensive were these drawings. I do not want to have to bring them in. I want to see how extensive they were.

A. Showing the general arrangement and the size of the house and things like that.

Q. Did not undertake to show the sizes of the timbers? A. No.

Q. Did not show the character of the material or anything of that kind? A. No, sir.

Q. Simply showed the ground plan, you might say?

A. The specifications called for the furnishing of the material and the like of that. [121]

Q. These were specifications for the repairs?

A. Yes, sir.

Q. Outside of these specifications you simply had your general knowledge of the vessel to go on?

A. That is right.

Q. Did you make up the estimate for the cost of the vessel to your company, or did you make up these figures \$79,600 here in this bid?

A. Made up the cost. And as I remember, my figure was not that. I have never seen this letter before. That was a letter that Mr. Heffernen wrote

(Testimony of L. Simen.)

himself. The figure I made was \$76,600. He might have added something on there for contingencies.

Q. The figures you made up included all the cost, profit and everything else?

A. Profit and overhead, but Mr. Heffernen might have seen some other points that made up the additional three thousand dollars.

Q. \$76,600 was your figures?

A. That is the estimate I made up for his approval.

Q. Can you now state what proportion of that figure was your estimate of the cost of the hull and house?

A. It was in the neighborhood of \$41,000 for the machinery; \$33,000 for the hull, and without going into the hundreds of dollars, some little under three thousand dollars for the inspection equipment, that is boats, without the furnishings. Now, these figures of ours do not include the furnishings.

Q. You figured forty-one thousand for the machinery? A. Yes, sir. [122]

Q. That included the boilers? A. It did, sir.

Q. And can you give the proportion of that as between the engines and boiler?

A. When you speak of engines, there are a lot of auxiliary engines. You mean the power boiler with the stack and uptake?

Q. Yes.

A. That boiler with the stack is worth, without installation or pipe—just the bare boiler you are getting at?

Q. You are answering it.

(Testimony of L. Simen.)

A. I want to know what you mean by bare boiler?

Q. How much would the complete boiler be?

A. Just the boiler?

Q. The boiler in the ship.

A. But no connections or anything?

Q. Without any connections.

A. The boiler in the ship, landed in the ship, is worth about seventy-five hundred dollars.

Q. What connections then?

A. There is a whole lot.

Q. You have forty-one thousand dollars including all this. How much of that did you add to the boiler in the ship, with the cost of the boiler all connected up?

A. That is hard to divide. When you commence to start from the boiler you run into a lot of other stuff. I could not give you that offhand.

Q. You cannot give it?

A. Not offhand, sir, not lump it off. There are too many items to make up the rest of it. [123]

Q. Could you give an approximate figure of all the connections of the boiler, the boiler connections as distinguished from the machinery?

Mr. BRONSON.—I submit the question should be made intelligible. If counsel wants to segregate it. There is no doubt at all that a boiler is ultimately connected to the engines. Now, the question should point out the dividing line, wherever counsel wants it, between the engine and the boiler.

Q. I ask the witness to point that out.

Mr. BRONSON.—The question is objectionable.

(Testimony of L. Simen.)

He might stop where the steam pipe leaves the boiler.

Mr. MERRITT.—I will stop wherever the witness stops.

A. I would like to know what to answer.

Q. You know there is a dividing line between the engine and the boiler?

A. Usually stops right there with the boiler installed.

Q. Very well, we will stop there. And that you say is seventy-five hundred dollars?

A. That is an approximate figure.

Q. Then you figure the engines in there with the auxiliaries all connected up to the boiler, as the difference between seventy-five hundred dollars and forty-one thousand dollars.

A. That is piping and everything, setting the engines and all that.

Q. And the hull and house you figure at \$33,000?

A. Yes, sir.

Q. Can you make a difference between the hull and the house, in proportion, in that figure? [124]

Mr. BRONSON.—I make the same objection to this. You should fix a dividing line between the hull and the house.

A. Where do you want me to start to divide it?

Q. Can you divide it? A. It can be divided.

Q. Where would you divide it then, where can it be divided?

A. Just wherever you want it divided.

Q. You divide it yourself?

(Testimony of L. Simen.)

A. You are asking the question. Where do you want it divided?

Q. I am asking you to divide it.

A. I said I could.

Q. Do it. A. Where do you want it divided?

Q. You do it anywhere, any place you want to divide it.

A. I would like to have you put it where you want it divided.

Q. You are testifying; I am not.

A. I want to know what you want?

Q. I did not say I wanted it any place. I am willing to take your division. I ask you to make a division.

Mr. BRONSON.—I would like to ask the witness an explanatory question, as to whether or not it can be divided or whether or not there is a well-defined place between the hull and the house where it can be divided?

A. It depends on the division, where he wants it.

Q. I do not want any place. If it can be divided in more than one place, make one of these divisions.

A. I should say the hull and joiner work.

Q. That is one place? [125]

A. The hull and the joiner work, that is a common subdivision.

Q. That is a good division. Well, we will take it at the joiner work. A. That is customary.

Q. I wanted to make the division of some kind. How much of that would you estimate the cost of the hull as distinguished from the joiner work?

(Testimony of L. Simen.)

A. The hull totaled about eighteen thousand dollars and the joiner work about fifteen thousand dollars.

Q. By joiner work you refer to everything above the main deck, don't you, or what might be called the first deck?   A. Yes.

Q. In making up your estimate for construction of this vessel, you figured on a vessel with a guaranteed speed of twenty miles?

A. I was not told that. I was told to duplicate the "Telegraph."

Redirect Examination.

Q. (Mr. BRONSON.) You were told to duplicate the "Telegraph"?

A. Yes, sir; that is what I was told to do.

Q. Now, I understood you to say that you did not include any of the furnishings in this estimate of yours?   A. No, none of what you call furnishings.

Q. In figuring on the repair work that counsel asked you about, you figured on complying with the specifications, didn't you?

A. On the estimate of repairs we made. I did make up [126] figures for repairs, and that is the work I figured on on these specifications.

(Testimony of witness closed.)

Mr. BRONSON.—That is all of our case.

Hearing adjourned. [127]

Seattle, Washington, January 18, 1913.

Present: Mr. ROBINSON, for the Libelant.

Mr. MERRITT, for the Claimant.

**Claimant's Testimony.**

**[Testimony of Capt. Gilmore H. Parker, for  
Claimant.]**

Capt. GILMORE H. PARKER, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) Your name is Gilmore H. Parker? A. Yes, sir.

Q. What is your business? A. Steamboating.

Q. What papers do you hold?

A. Master and pilot on Puget Sound.

Q. How long have you held such papers?

A. Thirty years; longer than that.

Q. Where do you reside? A. Seattle.

Q. Were you formerly master of the steamer "Telegraph," the stern-wheel steamer "Telegraph"?

A. I brought the "Telegraph" out of the Snohomish river, where she was built.

Q. How long did you remain master of her?

A. Well, I could not tell you. From the time she was built I was master of her until about 18 months, before she was turned over to Captain Green, of the Inland Navigation Company.

Q. Where did you operate her?

A. Between Seattle and Everett. Occasionally to Tacoma. An excursion once or twice over to Bremerton and down [128] to Bellingham.

Q. Now, during that time did you take her to any

(Testimony of Capt. Gilmore H. Parker.)  
other place than Puget Sound?

A. No, I went around with Captain McFarland to Portland, on account of knowing the boat and how to handle her in case of rough weather. Captain Scott wanted me.

Q. She was taken to Portland?      A. Yes, sir.

Q. Did she go down under her own steam?

A. Yes, sir.

Q. Where did she run down there?

A. Took her over to operate during the Exposition; they thought they might make some money.

Q. Did you run her any over there?

A. No, sir.

Q. And afterwards she was brought back to Puget Sound?      A. Yes sir.

Q. Then you went master of her again?

A. I went master of her again.

Q. And continued on this Everett run except these excursions?      A. Yes, sir.

Q. Could you tell about how many years you were master of her?      A. No, I could not.

Q. Altogether?      A. No.

Q. Do you know about how long she was in Portland?

A. I don't know that either. I came back and went on the "City of Everett" while she was in Portland. [129]

Q. So that you do not remember just how long the "Telegraph" was off the run?      A. No, sir.

Q. How long did you run the Everett?

A. Well, I ran her from the time she was built

(Testimony of Capt. Gilmore H. Parker.)

until I transferred on the "Telegraph"; then I ran her a time again when the "Telegraph" was laid up.

Q. What kind of a boat was the "Everett"?

A. She was a good little boat in her day.

Q. Stern-wheeler?      A. Propeller.

Q. And do you know about what her proportionate value would be to the "Telegraph"?

A. That would be pretty hard for me to say.

Q. What condition was she in when you last saw her?      A. The "City of Everett"?

Q. Yes, sir.

A. Well, in the condition that most of these old boats are.

Q. She is on the run now?      A. Yes.

Q. Now, did you ever operate the "Telegraph" when you were on her at her maximum speed—as fast as you could?

A. I have run her as fast as I could, several times.

Q. What is the distance in statute miles between Seattle and Everett, on the run that she was on?

A. Well, pretty nearly 33 miles.

Q. What was your usual time in making that run?

A. Stopping at Edmonds; we were generally about two hours and ten minutes from the time we left the other end, [130] stopped at Edmonds and arrived here.

Q. How long did you stop at Edmonds?

A. Five or six minutes.

Q. Were you on the "Telegraph" at one time when she raced the "Flyer"?      A. Yes, sir.

(Testimony of Capt. Gilmore H. Parker.)

Q. Just tell where you raced her, what the occasion was and what happened.

A. There were two races. One when she first came out, when the boat was new. We left here and went out to race the "Flyer." I told them we were going to.

Q. Was that the time Captain Scott was aboard?

A. Yes, We came together at Duwamish Head off the bell buoy and we ran away from her up to Alki Point, and our wheel was gone and we had to come back.

Q. Your wheel gone?

A. About half the buckets.

Q. What caused that?

A. Threw them out of her.

Q. Did she hit anything, or simply going fast?

A. She was turning her wheel over so fast, striking the water so hard that the buckets could not stand that speed.

Q. What was the other race?

A. It was an excursion over to Bremerton on the Fourth of July, I believe. The "Flyer" backed out and we did and the engineer he hollered up and he said, "You are a nice one trying to go out of here with the 'Flyer' and no steam on the boat." He says, "If you can hold back until we get to Duwamish Head I can beat them." So I jockeyed [131] him a little bit, like steamboatmen do sometimes, and when we got to the buoy, we were leading and they followed us clear over to the buoy on the other side on the way to Bremerton. They finally saw we

(Testimony of Capt. Gilmore H. Parker.)

had them beat and I think they went up the west passage to Tacoma. .

Q. Now, there has been testimony here, Captain, that the "Telegraph" was capable of making 20 statute miles an hour. I will ask you whether or not in your opinion she could make any such speed as that.

A. Do I think she could make it?

Q. Yes, sir.

A. Not carrying legitimate steam.

Q. What was her legitimate steam?

A. I am not sure, but I think 160 to 165 pounds. I would not be positive.

Q. It was not more than that. I think the testimony here is 160 pounds.

A. I think that is it. It has been a long time since I looked at her gauging.

Q. What speed would she make, the maximum speed, do you think she could make under favorable conditions under legitimate steam?

A. Well, if we run as I tell you, she would leave Everett at 9:20, stop five minutes at Edmonds, about two hours following make the  $32\frac{1}{2}$  or 33 miles.

Q. A little over 16 miles an hour.

A. Yes. We used to figure on doing that run under about a three-eighths cut-off. Of course she would do better to run full stroke.

Q. There has been testimony in this case, Captain, that [132] the "Telegraph" was the fastest stern-wheel steamer ever constructed. I will ask

(Testimony of Capt. Gilmore H. Parker.)  
you whether or not that is true.

A. Well, I do not think she was. I think the new "Telephone" was the fastest boat.

Q. How do you know that?

A. I will tell you. I do know, come to think of it. Captain Cochrane showed me some photographs of the race between the "Telegraph" and the "Telephone" on the river.

Q. What did they show?

A. They showed where the "Telegraph" was ahead and the last photograph showed the "Telegraph" was behind, on the stern on the starboard quarter of the "Telephone." I do not know what conditions they were running under.

Q. Now, was there anything ever done to her hull that would affect her speed in any way?

A. Not that I know of. They made some changes, I believe, in Portland. I do not think it affected her one way or the other.

Q. You did not have anything to do with cutting off any of her stern?

A. No. I believe that was done in Portland.

Q. What was her condition when you were master of her last.

A. She was in good condition then.

Q. Now, they had put in compound engines. Was that after you left her?

A. Yes, I was on her several times afterwards, mate on her.

Q. In your opinion, would these compound engines give her greater speed?     A. No, sir. [133]

(Testimony of Capt. Gilmore H. Parker.)

Q. Would it decrease her speed any?

A. I think it did.

Q. For what reasons?

A. Well, they were so much weightier, and put the boat that much by the stern. And then I used to talk to the engineers about it, and they said she could not do as well with them. There was not much difference, but a little.

Q. The "Telegraph" was a rather fine model, was she not? A. Nice model.

Q. Built, as the testimony shows here, largely for carrying passengers? A. Yes, sir.

Q. Did she have capacity for very much freight?

A. No, sir.

Q. What would be the effect on her, if any, to run her forced steam pressure?

A. What would be the effect on her?

Q. Yes.

A. There would be no particular effect.

Q. You spoke of this time when she threw the paddles off.

A. Might do something of that sort. But you take a paddle-wheel boat—stern-wheel boat—the faster she turns the wheel the less vibration there is. If he cut her down to one-third or two-thirds of speed, the bucket goes so much slower, she would wiggle up and down. There is less vibration when you are what is called chasing, that is, runs smoother.

Q. How long have you been on the Sound?

A. Since 1867. [134]

(Testimony of Capt. Gilmore H. Parker.)

Q. And are you familiar with other waters on the Pacific Coast?    A. Not on the coast, no.

Q. I mean inland waters along the coast?

A. On the Sound I am.

Q. Do you know whether there are any waters, besides the waters of Puget Sound, where the "Telegraph" could have been taken and used?

A. She might have been taken to the Columbia River. She might have been taken to San Francisco bay. I don't know whether she could have done anything down there or not.

Q. How about Alaska—could she be taken to Alaska?

A. No, you could not do anything with her there. She is too long-legged.

Q. Too long-legged?    A. Yes, sir.

Q. Are you familiar with stern-wheel vessels on Puget Sound?    A. Yes, sir.

Q. The different lines of vessels on the Sound?

A. Yes, sir.

Q. You know the different ones?

A. Yes, sir.

Q. And the use that there is for them on the Sound, stern-wheel vessels?    A. Yes, sir.

Q. Are you familiar with the value of vessels that are used on the Sound?    A. Not very well.

Q. At the time she was sunk I will ask you whether or not, [135] in your opinion, she was a practical vessel, or a vessel having any great value for any use on any of the runs on the Sound where she could be used—I mean practical use, a vessel of high value?

(Testimony of Capt. Gilmore H. Parker.)

A. Well, that is a sort of question I do not know just how to answer. These different lines are all covered. Do you mean to put in competition on some run or to be used in the place of another boat on a run?

Q. Well, are they now building and using boats of her type, generally upon runs on the Sound?

A. No, sir, they are not.

Q. What kind of vessels are they using now?

A. You can see what they are building down at Moran's. Captain Green is building a different class of boats now.

Q. What class of boats are they?

A. Iron and steel boats, rather, propellers.

Q. That class of boats is taking the place of the old stern-wheelers? A. Seem to be.

Q. You were not on the "Telegraph" when she ran to Liberty bay, over to Paulsbo? A. No, sir.

Q. What, in your opinion, would be the reasonable value at Seattle, in April, 1910?

A. I could not give any idea at all.

Q. After she was originally built and brought out of the river, it is a fact, is it not, that a good many changes were made in her from time to time?

A. They made some small changes several times. I believe [136] they made one in the dining-room, some small change, I have forgotten now, and then changed the engines, taking the old engines out and putting new engines in, and necessary equipment like circulating pumps, etc. Otherwise there was very little change made. They cut down the windows in the pilot-house.

(Testimony of Capt. Gilmore H. Parker.)

Cross-examination.

Q. (Mr. ROBINSON.) Did you ever run on the "Flyer"?    A. I have been mate of her.

Q. Do you know what her maximum speed was, how much she could make?

A. Well, her speed the best time that I ever knew the "Flyer" to make was when she raced the "Victorian." I was on her with Captain Struve. She made the run in 1:23½. An hour twenty-three and a half minutes. It is 24½ nautical miles; you can figure it out.

Q. What do you say she made it in?

A. She made it in an hour and twenty-three minutes.

Q. That would be in the neighborhood of twenty miles an hour?

A. You can see what time she made it in.

Q. That would be nearly 28 miles, 24 knots?

A. Yes, sir.

Q. Well, Captain, the "Flyer" could make twenty miles an hour, could she not?

A. Well, they would have to force her.

Q. You speak of one time beating the "Flyer" and discontinuing the race on account of throwing the paddles or buckets. Do you know whether some changes were made [137] in the wheel after that?

A. Yes; they put in what they called a double bucket. Instead of being one bucket straight across, they split the buckets.

Q. Do you know whether or not they were put in

(Testimony of Capt. Gilmore H. Parker.)

with hardwood at that time?

A. They were put in with hardwood.

Q. Did you ever run her at maximum speed after that, after that wheel was put on?

A. Well, we had that run from Seattle over to Bremerton.

Q. Had no trouble with her throwing the buckets at that time? A. No trouble at all.

Q. What speed do you think the "Telegraph" made at the time she raced the "Flyer"?

A. That I could not tell you what speed she did make. I knew at the time; it was on the log-book. I do not know whether they preserved that or not.

Q. It was a real race?

A. Oh, it was a race.

Q. And as far as you know the "Flyer" was making everything she could?

A. As far as I know she was doing the best she could, and of course we were doing the best we could.

Q. Don't you think, then, considering all the other matters testified to, that you were making better than twenty miles an hour?

A. I do not think it was. You see the "Flyer" was not near as good a boat when we were racing this time as when we raced the "Victorian." It makes a difference, the same [138] as it makes a difference with the "Telegraph." She is not near as fast a boat now as when she was built.

Q. You speak of the change in her engines and the increase in her weight. Was there not some

(Testimony of Capt. Gilmore H. Parker.)  
compensation there? Didn't they take out the water-tanks?

A. It put the boat by the stern. The water-tanks, I believe, were forward of amidships. The engines that are in her now are very heavy, and the engineers claim that they cannot do as well. I have heard them say so.

Q. You don't know yourself?

A. No, only what I have heard them say—well, I know she did not seem to me to make as good time. There was not much difference, but some.

Q. Now, you say you have heard the "Telephone" made faster speed?

A. I saw photographs of that.

Q. Where were these taken, on the Columbia river? A. Taken going up the Willamette.

Q. You were not present? A. No.

Q. And all you know about it is what is shown in the photographs? A. Yes.

Q. And have you not also heard that the "Telegraph" carried a broom on her mast to indicate that she had beaten all the boats down there?

A. No.

Q. When you speak of the time between Everett and Seattle, you mean the elapsed time from dock to dock?

A. The time we left the dock and got on the course and rang [139] stop bell or slow bell in Seattle.

Q. When you speak of stopping five minutes at Edmonds, do you mean tied up five minutes, or what?

(Testimony of Capt. Gilmore H. Parker.)

A. Generally, from the time we slowed down until we started to leave the dock; no more than six minutes, very seldom.

Q. You had a regular schedule on that route?

A. Yes, sir.

Q. And you were at no time trying to beat that schedule; in other words, you were running her so as to get a certain rate of speed, were you not?

A. Yes, sir.

Q. You were not pushing her to her utmost by any means?

A. No, not pushing her to her utmost.

Q. You said you were running under a cut-off?

A. Yes. All these boats do to save fuel. If she run full speed she would use up all the oil the Standard could bring here.

Q. Captain, you were asked what the market value of the "Telegraph" would be, and you said you did not feel capable of answering that. Why?

A. Well, I haven't any idea what the market value would be.

Q. Would you say that there was such a thing as a market for a boat of her class?

Q. She is a passenger boat? A. Yes, sir.

Q. Primarily? A. Yes, sir.

Q. Would there be any bidders or purchasers for such a [140] boat, other than those who wanted to use her for passenger business?

Mr. MERRITT.—I object as not proper cross-examination.

(Testimony of Capt. Gilmore H. Parker.)

A. Well, not unless you make a towboat out of her, she would make a good, powerful boat.

Redirect Examination.

Q. (Mr. MERRITT.) Now, when you were running her in these races did you run her under higher steam than she was entitled to by her inspection?

A. That is hard to tell. That is a question a man don't like to answer sometimes.

Q. I will ask you this, Captain, and this will not compromise you, whether or not you could have beaten the "Flyer" with 160 or 165 pounds of steam, the amount the "Telegraph" was authorized to carry?

A. Now, is not that beating the nigger around the woodpile? That is almost the same question you asked first.

Q. I do not think it would have the same effect on you.

A. We in the pilot-house, Mr. Merritt, do not know how much steam they have below; that rests with the engineer.

Q. Then, in your opinion, could she beat the "Flyer" using the amount of steam she was authorized to carry?

Mr. ROBINSON.—I object, the witness is not qualified to answer.

A. I do not think I am qualified to answer that.

Q. On the regular run to Everett, did she carry the full amount of steam that she was entitled to carry?

A. Oh, she carried the full amount, though she

(Testimony of Capt. Gilmore H. Parker.)  
was running on what was called the cut-off. [141]

Q. What effect did that have on her speed?

A. Well, it reduced the speed a little and saved considerable fuel.

Q. Would the reduction in speed be very material, merely using the cut-off?

A. If they run that boat full speed she would make a mile and a half better time, if they run her hard.

Q. A mile and half better than the usual time she did make? A. Yes, sir.

Q. That, in your opinion, would be the most she would make? A. Yes, sir.

Q. What draft did she have to have in order to make her fast speed?

A. She wanted to draw about eight feet three inches forward.

Q. And she burned oil, did she?

A. The first day she would do well, but if we did not oil her every second day she slowed down.

Q. What do you mean by oiling her every second day?

A. To keep her trim, to keep her deep enough in the water to get speed.

Q. Where were these oil tanks on board?

A. Forward.

Q. So that she would not be able to make the best speed unless you had the oil-tanks filled to keep her nose down and her wheel far enough out of water.

A. She had to be eight feet in the water forward to run.

(Testimony of Capt. Gilmore H. Parker.)

Q. At the first time you raced with the "Flyer" did you have passengers on board? [142]

A. No. Nothing at all. We were all fixed for a race. The time we went to Bremerton we did.

Q. Now, you were asked if there was a market for vessels of that kind, and you stated that you could make a towboat of her. If the "Telegraph" had any value, special value for the owner because of her speed or any other qualifications, would she not have the same value, or some value at least, for anyone else on account of the same speed or conditions?

A. The only thing I know of as a passenger boat would be to reserve her as an extra to take another's place occasionally, on runs like Seattle and Tacoma, and over to Bremerton or Olympia.

Q. If she had value to a person owning a line from Seattle to Tacoma, she would have a value to a person who wanted to put on a fast boat, or a boat well equipped for that run in opposition to the boats already on the run, would she not?

A. You mean would she be of value?

Q. I say she would have a value to the opposition to put on that line, just the same as she would have a value to the person already owning her and having a run. If she was worth anything for that run to the person owning the run, she would also be worth something to a person who wanted to take that run away from the one that had it?

A. I don't think she would.

Q. Why not?

(Testimony of Capt. Gilmore H. Parker.)

A. Because the run being held the old "Telegraph" could not go on that run and make anything at all. [143]

Q. She is not equipped so that she could take the business from the boats already on the line?

A. No, certainly not.

Q. But there are some other runs where she might be able to if she had special value to the owner for these runs?

A. I do not know where there are any runs you could put that boat on but the Everett run and be operated by the same company.

Q. There has been testimony here that the "City of Everett" had no value. Is that correct, in your opinion?

A. No. The boat is a little old, but she seems to be going along making her regular time between here and Everett and carrying the passengers; she must have some value. I should think she has some value. Business, I suppose, is rather slack and they can use the "Everett" and lay the "Flyer" up. If they did not have the "Everett," the "Flyer" would be rather expensive to put on that run at this time. She must have some value.

Q. (Mr. ROBINSON.) Captain, when you had this Bremerton race with the "Flyer," you had passengers aboard, did you? A. Yes, sir.

Q. A big crowd?

A. Had a couple of hundred passengers.

Q. And you did not know at the time that you raced the "Flyer" whether the "Flyer" was carry-

(Testimony of Capt. Gilmore H. Parker.)  
ing her authorized steam or not, of course.

A. I did not know what the "Flyer" was carrying.

Q. You are familiar with the passenger traffic on the Sound [144] in general? A. Yes, sir.

Q. You do not know of any route upon which a boat of the size of the "Telegraph" could be used, that is not occupied by some line?

A. I do not know of any.

Q. Would there or would there not be any market value for the "Telegraph," unless that value was established by some one that had a route to use her on?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial. The witness is not qualified to answer, and it is not proper cross-examination.

A. She would be of no market value on Puget Sound as a passenger boat only the way she is now operated as an extra boat by the company which owns her.

Q. (Mr. MERRITT.) This time that the "Flyer" made this fast time, you do not know what steam she carried then? A. No, sir.

Q. Whether carrying an excess of the amount allowed or not? A. No, sir.

Q. Do not know the state of the tide or wind or what conditions?

A. No, I have forgotten how the tides were. There was no wind.

Q. You say on this race to Bremerton you do not know whether she was carrying an excess of steam

(Testimony of Capt. Gilmore H. Parker.)

or not? A. No, sir. [145]

Q. (Mr. ROBINSON.) You did not beat her so bad that the state of the tide or the wind would influence one boat more than the other?

A. No, we beat her that bad that she came up alongside the pilot-house and ran all the way across, and stayed right there. We did not get away from her but she did not get by us.

Q. You beat her the first time?

A. Oh, the first time, when the "Telegraph" came out, we beat her readily.

Q. Where did you say you stopped, over by Alki Point? A. Yes. The wheel commenced to go.

Q. How far ahead of her were you?

A. The length of her; a length from Duwamish Head to Alki Point.

(Testimony of witness closed.) [146]

**[Testimony of Joshua Green, for Libelant  
(Recalled).]**

JOSHUA GREEN, recalled for further cross-examination.

Q. (Mr. MERRITT.) What was the insured value of the "City of Everett" at the time she was insured?

A. I could not tell you, Mr. Merritt, without telephoning down to the office and getting it from the books.

Q. Was it not \$27,500?

A. (After witness telephones.) \$27,270.

(Testimony of witness closed.) [147]

**[Testimony of Capt. Chas. E. Wilson, for Claimant.]**

Capt. CHAS. E. WILSON, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) You reside in Seattle.

A. Yes, sir.

Q. How long have you lived here?

A. Since 1890.

Q. What is your business?

A. Master mariner.

Q. How long have you been a master mariner?

A. Since 1882.

Q. What papers? A. Master ocean coast-wise.

Q. What business have you been engaged in in Seattle the last few years?

A. In the marine brokerage, buying and selling.

Q. Buying and selling vessels? A. Yes, sir.

Q. Have you bought and sold vessels at Seattle during that time?

A. Practically all the time for the last nine years, except in the summer time I am away.

Q. Have you bought or sold any stern-wheel vessels during that time?

A. I am sorry to say I was never successful in selling stern-wheel vessels. I suppose I have made out fifteen or thirty reports and tried very hard to sell them but I never succeeded in selling one that I remember. I forget whether I sold the "Mary F. Perly" or not.

Q. Have you known stern-wheel vessels being bought or sold during that time? [148]

(Testimony of Capt. Chas. E. Wilson.)

A. Yes, I know that Captain Fred Wilson bought the "Greyhound."

Q. You knew of the sale of the "Telegraph"?

A. Yes, sir.

Q. You knew of the sale of the "Vashion"?

A. Yes, and the "State of Washington" once or twice.

Q. These are all stern-wheel vessels?

A. Yes, sir.

Q. Now, are you familiar with the waters of Puget Sound and other waters in which the stern-wheel vessels could be taken from Puget Sound and used? A. Well, I have a general knowledge of it.

Q. Did you know the steamer "Telegraph" before she was sunk? A. Yes, sir.

Q. Were you somewhat familiar with her and knew how she was constructed?

A. Oh, I knew more or less of that vessel from the time they started to build her; took considerable interest in her. Of course it was the subject of conversation among marine men. I knew the engineer very well that worked on her and we stopped at the same house part of the time.

Q. I will ask you whether or not the "Telegraph" could have been taken to any other place than Puget Sound and used.

A. Well, she might have been use in San Francisco or on the Columbia, but with what success I could not say. I do not think she was properly designed for the Columbia river, too much draft. In 'Frisco bay it would not make so much differ-

(Testimony of Capt. Chas. E. Wilson.)

ence, but for the Sacramento river she would be pretty heavy. [149]

Q. I will ask you whether or not in April, 1912, there was a market at Seattle for vessels—stern-wheel vessels?

A. Why, there is always some market for anything, even a jack-knife out of your pocket, if you sell it cheap enough. But vessels of that class I would say are obsolete and out of date, but she surely would have brought something.

Q. If she had been offered for sale at Seattle in April, 1912, before she was sunk, in your opinion, then, there would have been offers to buy her at some price?

A. Yes, I think some one would have bought her.

Q. You know as a matter of fact that she has been sold since she was sunk, the wreck has been sold?

A. Any vessel is worth something, if for nothing more than junk.

Q. What, in your opinion, was a fair, reasonable market value of the "Telegraph" in April, 1912, in Seattle, before she was sunk?

A. Well, that is pretty hard. There was not a great many transfers of that kind being made, in comparison with other boats. I would have to answer that if I was to buy her for speculation I would not have given over eight thousand dollars. I don't know that I would give that. But if I had been on the stand swearing to the actual value of the vessel, I would probably make it sixteen thousand dollars.

(Testimony of Capt. Chas. E. Wilson.)

Q. That is your opinion of what her value was at that time, \$16,000?

A. Well, the market value is hard for me to say. I do not know that I could have disposed of her at all, but [150] probably you could at sometime, because she has been disposed of since the wreck. The market is not a live one for that class of vessels.

Q. When you say the value is sixteen thousand dollars, you mean that was her actual value at that time? A. That is the actual value.

Q. What did you take into consideration in determining her actual value at sixteen thousand dollars at that time?

A. Well, the cost and the age and the condition in which they were keeping her, and the depreciation of that class of vessels.

Q. Did you take into consideration also the use to which she could be put, whether here or any other place where she could have been taken?

A. Sure, that has to be considered in the market value of anything.

Q. You took all these things into consideration in fixing that value? A. Yes, sir.

Q. Now, you speak of the depreciation of boats of that class. There is testimony in this case that the vessel was built in 1903 and was, therefore, nine years old, and had been operated nine years; taken to the Columbia river and brought back to Puget Sound, and that the depreciation in her hull and house would not exceed 25% from 15% to 25%, in that time. State whether or not in your opinion

(Testimony of Capt. Chas. E. Wilson.)

that would be the depreciation of that vessel.

A. Oh, I should think a lightly constructed upper works for a vessel of that kind in nine years it would be depreciated [151] at least fifty per cent. I do not think she would last a total of over eighteen years and be safe for three or four hundred passengers to stand up on.

Q. Now, the testimony in the case shows that the depreciation in boilers for the nine years would not exceed twenty-five per cent. What, in your opinion, would be the depreciation of the boilers for that length of time?

A. Well, that would depend on the kind of boiler and usage it has had. I think all boilers are subject to being rebored at ten years and steam reduced. But with a boiler of that kind thirty to forty per cent would be the proper depreciation on her.

Q. Now, it appears in this case that when she was constructed that on account of the crown-sheet of the boiler not coming over far enough to answer certain regulations, the Inspectors required bands to be put around the boiler and that then she was only allowed 160 pounds of steam; do you think after taking that fact into consideration that the depreciation should be the amount you have stated?

A. At what time was this done?

Q. That was done when she was first constructed, these bands were put on the boiler.

A. That is unusual. I would think the boiler must have been faultily constructed in the first

(Testimony of Capt. Chas. E. Wilson.)  
place if they coopered it when she was new.

Q. Have you ridden on the "Telegraph"?

A. Several times; yes, sir; a great many times.

Q. Do you know about what her average speed was? [152]

A. About fourteen and a quarter knots.

Q. There is testimony in this case that she could run twenty statute miles per hour. I will ask you whether she could make that time, in your opinion?

A. I think that at the time she raced the "Flyer" that she was working up to about 19. At that time everything let go when they opened her out. That is, the whole propelling part of the vessel, the buckets gave out.

Q. Would that be a practical speed to run her at?

A. No. Do you want to know what she would stand up to on an average speed on a run?

Q. No, I wanted to know the maximum speed.

A. She was new and light and out for a race, and I think that was all she could do; in fact, that showed it because things began to let go.

Q. More than she could do?

A. Well, she done that and broke everything and she could not do anything. I believe she did go back under her own steam.

Q. In your opinion, do you believe that she could have made it at 165 pounds of steam allowed by her inspection?

A. Well, I could not say that, you know.

Q. You do not know whether she was using more steam?

(Testimony of Capt. Chas. E. Wilson.)

A. No, I do not know. I have always understood at the time, of course I knew people on her, and we naturally would get these reports of these things. It was a matter of excitement on the waterfront, and I understood she was working at her maximum, that is, they just started her out, and of course from the time the "Flyer" had made before, that she can do a good deal better than that. [153] The "Flyer" people on the "Flyer" that they were just monkeying along to let him come alongside, and if she passed ahead of them a few lengths, they would commence to drop the hooks on the "Flyer." Very few men know what power the "Flyer" always has reserved. She has a very powerful engine, 2,500 horse-power, and they were ready to drop her down, and there is no doubt in my mind but what the "Flyer" would have beat the "Telegraph" to Tacoma very bad. They were kind of juggling with them to let her pass them before they started in to show themselves. I think it will be conceded that on the Sound very few vessels ever beat the "Flyer."

Q. Could the "Telegraph" have been turned into a towboat?

A. Stern-wheel boats tow logs very successfully in smooth water, any place where there is no wind. In very moderate weather they will take a big tow and tow it well. But since the competition in towing with boats of the propeller type they have not been in much demand. I do not think she would have been successful in many places. Some mill

(Testimony of Capt. Chas. E. Wilson.)

company might take her that would give her their own fuel and have their own logs to tow, give her their own business such as a towboat can do.

Q. She would have, then, some value for that?

A. If anybody needed such a boat she would have value, sure.

Q. Have you ever been on the "Telegraph" when she was on the Everett run?

A. Several times. Traveled up and down there.

Q. What speed did she make then?

A. About fourteen and a quarter miles average time; about two hours and fifteen minutes from Seattle to Everett. [154] Leave here at 12 o'clock and get there from 2:10 to 2:12 to 2:15, and in making the trip I suppose in making the stop at Edmonds, from the time she slowed down until she left the dock again, I suppose it would take about ten minutes.

Q. There is testimony in the case that the "Telegraph" was the fastest stern-wheel vessel ever constructed. Is that correct?

A. Well, I never understood it that way. I always understood that the "Telephone" was a very much faster boat, and that the "H. J. Cochrane," of San Francisco, was the most expensive and speediest stern-wheel boat that was ever built in the United States. I do not think there is any doubt about the "Cochrane" whatever.

Q. Do you know about the "Bailey Gatzert"?

A. I knew her at the time.

Q. How was her speed compared with the "Telegraph"?

(Testimony of Capt. Chas. E. Wilson.)

A. I would consider the "Gatzert" a faster boat than the "Telegraph." The "Gatzert" was a pretty fast boat in her day.

Q. She was a stern-wheel boat? A. Yes, sir.

Q. These boats you speak of now, were they built to carry freight as well as passengers?

A. Well, the "Cochrane" was built to carry about 400 tons of freight. She is a very large boat. She has powerful engines. Probably three or four times the size of the "Telegraph." I can give it—I have the record in my pocket, if you want it. She would carry about 400 tons. The "Telephone," I do not know what she would carry, but [155] probably two or three hundred tons, and the "Gatzert" could carry some freight. It would be a guess with me at the present time, but probably a hundred tons and likely more than that. They were passenger boats.

Q. Were any of these boats that you speak of ever sold that you know of, or offered for sale?

A. Well, the "Cochrane" was listed with me for several years. I have a picture of her here.

Q. Describe what kind of a boat she was.

A. She was about 209 feet long; 25 feet beam; 8 foot hold and 1200 horse-power.

Q. What price was she listed at with you for sale?

A. She cost \$125,000; then she started on the market at \$85,000 and kept dropping until she went as low as \$8,000, not to me, but Captain Harry Crosby told me she was offered to him for eight thousand

(Testimony of Capt. Chas. E. Wilson.)

dollars. And I know a man here in town that put an option on her at \$1,500 and lost it at a price of fifteen thousand, and it was around there for some time. Of course, the price of fifteen or sixteen thousand dollars was considered the price that she could be bought for for one or two years in San Francisco bay. Now, the "Greyhound" was a pretty fast passenger boat, and she sold for I think \$4,200, that Wilson paid for her. I know I had her for sale all the way from \$7,500 to \$4,000 after he got her and got another boat.

Q. How about the "Nunivak"?

A. She was a United States Government boat, about 200 feet long, 36 foot beam and 8 foot hold. Her horse-power, I do not know, but think it was about 850 or 900 horse-power. [156] The contract price was \$66,000. She was sold at St. Michael for \$5,000. She was brought down here and put on the market for twenty thousand dollars and dropped down to about \$15,000. Finally she was sold somewhere between those figures.

Q. How did the "Telegraph" compare in value with the "Nunivak"?

A. She did not cost nearly as much. She is not as big a vessel. And the machinery in the "Nunivak" is the finest made, and I should say a great deal more powerful; in comparison I should say that, to be liberal with the "Telegraph," she was not more than two-thirds the value of the other boat.

Q. (Mr. ROBINSON.) The "Telegraph" was two-thirds the value of the other boat.

(Testimony of Capt. Chas. E. Wilson.)

A. Yes. The other one was a bigger boat.

Q. (Mr. MERRITT.) Then from your experience in buying and selling boats, and of your knowledge of them and the demand for vessels at Seattle and wherever vessels can be taken from Seattle and used, if the "Telegraph" before she was sunk had been offered for sale by someone who wanted to sell but did not have to sell, there would have been persons willing to buy her at some price, who were not compelled to buy her?

A. Yes, there is no doubt of that. I seldom ever saw any vessel set on this market that could not be sold for a price to a junkman. They always buy them for something.

Q. In your opinion, the fair value of her at that time was \$16,000?

A. Well, actual value of the boat, yes. [157]

Q. You would not say that she could not have been sold in the market for that much? A. No, sir.

Q. That there would not have been parties who would pay that much for her? A. No, sir.

Q. By the way; do you know whether the "Telephone" was sold?

A. She was on the market a long time on the Columbia river.

Q. Do you know anything about her sale, her having been sold?

A. Nothing, only hearsay. I had no connection with it. She was listed all the way from \$50,000 to \$24,000. I never was able to handle her. I had nothing to do with the sale.

(Testimony of Capt. Chas. E. Wilson.)

Q. How much? A. \$50,000 to \$24,000.

Q. You do not know what she finally sold for?

A. I understood \$24,000, but I do not know.

Q. She was sold to a San Francisco company and taken there?

A. Yes, the railroad there, the Western Pacific. She is a ferry there; I have seen her there since.

Q. That sale took place about 1909, about the year of the Fair here, when Green bought these boats?

A. My remembrance is that the "Telephone" was sold before Mr. Green took this line over here. It seems to me it was a year or two.

Q. What kind of a boat was the "Telephone," compared with the "Telegraph"?

A. The "Telephone" I went over twice particularly, once very carefully, and she was a boat of about 900 horse-power [158] as against the "Telegraph's" 750. She was well constructed and properly designed as an expert model, and being larger in proportion in every way, and equally as good or better machinery, she naturally must have cost more.

Q. And did she have a greater value, in your opinion, than the "Telegraph"?

A. I should say so. She was an all-around boat, could carry freight or passengers. She was not classified for any special business.

Q. Do you know whether she was fast or faster than the "Telegraph"?

A. Well, I never saw the boats run together, but of course that was always understood, and I know of

(Testimony of Capt. Chas. E. Wilson.)

no reason why she should not. For I know she had better lines, better model and was a higher power boat.

Q. And from your knowledge of boats, and what you have seen of both vessels, in your opinion would she be as fast or faster than the "Telegraph"?

A. Oh, yes; there would hardly be any doubt about that. She was no freak; she was a regular model, on lines improved on for the last eighty years in building boats. While the "Telegraph" is a departure entirely and a freakish model.

#### Cross-examination.

Q. (Mr. ROBINSON.) How long were you a master actively?

A. Since I was 18 years old on the Atlantic coast.

Q. Have you been actively engaged the last four or five years?

A. No, I have been ashore a good deal of the time handling [159] this business.

Q. Since when? A. Oh, eight or nine years.

Q. Were you ever master of a stern-wheel boat?

A. Yes, sir.

A. The "Mary F. Perley"—

Q. Where were you—on the other coast?

A. No. Out here, they do not use them there.

Q. Now, you have testified here, Captain, as to the relative speed of certain of these vessels.

A. I have been master of the "Fairhaven," and was on the "Greyhound" a while, and probably could dig up a few more.

Q. Were you ever master on any of these vessels

(Testimony of Capt. Chas. E. Wilson.)

for any considerable length of time at one time?

A. I don't hardly think any great length of time, because I shifted around from one to the other to get knowledge as a pilot, and then I went into piloting in Alaska waters, which preferred to going as master. I was successful at that for a great many years.

Q. Were you on either the "Telegraph" or "Flyer" at the time those races took place?

A. I was not. I was on the "Victorian" at the time the "Victorian" and "Flyer"—no, I was not. I saw these vessels go out though.

Q. Everything you know about what happened there is what some officer told you, is it not?

A. Exactly, their engineers told me when they came back.

Q. You said everything went to pieces on the "Telegraph." What did you mean by that?

A. Well, I retracted that statement by saying that her [160] propelling power threw the buckets out of the wheel, and were split up pretty bad. Captain Parker told me that when he came back on the dock at the time when it was very fresh in his mind.

Q. You testified also that the "Flyer" was just jockeying along intending to pull up whenever they wanted to. How did you know that?

A. By the chief engineer.

Q. He told you so?

A. Yes, sir; he told me so. He and I were very friendly, as we lodged in the same house.

Q. These are the kind of statements made about

(Testimony of Capt. Chas. E. Wilson.)

all classes of races, horseraces and everything else?

A. There is no question about the "Flyer" being able to do better than that from her power.

Q. So you think the "Flyer" was beat at that time because she was not trying to do her best?

A. I do not think there is any doubt about that. They let the vessel come out, the same as you would. If you were racing with a fast horse, you would let them come up to see what they could do if you were pretty sure you could beat them.

Q. Just jockeying?

A. You cannot start off with the "Flyer" right out from the dock under a full head of steam and get the best rate out of her and drop her down when she is partly cold.

Q. Where were they when you were at Duwamish Head? A. Less than two miles.

Q. The "Flyer" could get all of her speed by that time?

A. There was no race; there was no certainty that there [161] would be a race. The "Telegraph" was a new boat out jockeying around to see if things were in shape. She laid up inside of the line and then started out and came alongside, and whether by agreed signals I do not know, but anyhow they concluded they were in good condition and they would hook on that day. I believe Captain Parker will state to you that they decided they would. They had been out once or twice before that if they had been in good condition. A new boat, you know, you do not like to crowd them, so they had from Alki

(Testimony of Capt. Chas. E. Wilson.)

Point two miles, and I think it was not more than two miles beyond that where this took place.

Q. Now, what do you say the time was that the "Telegraph" made on her Everett route?

A. Two fifteen the times I was on her. Left here at 12 and got there from 2:10 to 2:15.

Q. Did you communicate with the officers or engineers as to whether that was their regular speed?

A. No, I do not think I did. That was the schedule at that time. You had to be there to leave at that time. You had to be there in order to leave there on time.

Q. Now, you testified that perhaps on the market you could get eight thousand dollars, or that you would think that that was a fair speculative price.

A. I don't think I testified that.

Q. What did you say?

A. I said I did not think I would pay eight thousand dollars for her as a speculation.

Q. But you thought her worth was in the neighborhood of sixteen thousand dollars. [162]

A. I said if I was put on my oath I would testify that.

Q. In other words, Captain, you do not think you could get on the market for a vessel of that class what was she worth? A. No, sir, I do not.

Q. You think you could not? A. No, sir.

Q. In other words, the market value for which a person could get a boat, especially a boat of this kind, would not reflect what her value was?

A. Not reflect what she would cost. I do not

(Testimony of Capt. Chas. E. Wilson.)

know whether the market value would be what you could get it for or not. I suppose it is.

Q. There is no market in the sense there is for a ton of potatoes?

A. Boats go up and down like iron and potatoes.

Q. You cannot make a definite quotation on them like you can on articles commonly used and desired, can you?

A. They fluctuate just the same. There is a boat here now that they paid thirteen thousand dollars for and she is not worth over six.

Q. You say under oath that you think this vessel is worth \$16,000 and yet you would not want to pay more than eight thousand dollars for her as a speculation?    A. Of my own personal money.

Q. Do you not mean that the market, if there is such a thing as can be called a market, does not reflect the real value of the boat?

A. I would be pleased to answer any question I can in a fair way. Now, I would think it is hard to answer that [163] question. Such vessels as these are out of class on Puget Sound. On some rivers they use them. On the shallow rivers they are the best, but they are usually lighter draft. Now, then, there is a lot of real value in them, like an old automobile; they give good service, yet you can buy them for almost nothing. They are out of date, and there are not many people who desire that kind of an old vehicle or steamboat.

Q. You cannot really say that anybody would desire that kind of a vessel?    A. I would say this—

Q. For use—

(Testimony of Capt. Chas. E. Wilson.)

A. In speaking of buying her as a speculation, why it would be a long time, perhaps, before you could dispose of her.

Q. Well, the buyers would have to come from some one who probably wanted a passenger vessel?

A. Or towing vessel. I do not think she could be classed as a freight vessel, she has too narrow a bottom and rather deeper than the average stern-wheel vessel.

Q. Getting at the element of value, it would depend on what use could be made of her?

A. It would from my standpoint.

Q. Also from anybody's?

A. I would not say what you would consider, but as far as my knowledge of marine matters go, that is exactly how I would figure it.

Q. When was the "Telegraph" built?

A. I would have to refer to the records for that; I think 1901. I could tell you. [164]

Q. Did you know before you were told by counsel here this morning that there had been a band put on that boiler?

A. Well, I presume I did, because the engineers who put the machinery in her and built her stopped at the same hotel that I did and I was friendly with them. They told me nearly every incident that happened in the construction of the boat.

Q. Do you know what changes have been made in the boat in recent years?

A. I think they compounded her engines.

Q. How much did she cost?

A. I understood she cost \$46,000.

(Testimony of Capt. Chas. E. Wilson.)

Q. You understood she cost \$46,000?

A. Yes, sir.

Q. You testified that you made this estimate of \$16,000 taking into view her cost, the use to which she could be put and her depreciation?

A. Yes, sir.

Q. When you made that estimate you made it on a basis of belief that she cost \$46,000?

A. Yes, sir.

Q. Were you acting in the capacity of broker when the "Greyhound" was sold?

A. Oh, yes, when she sold.

Q. You negotiated the sale? A. I did not.

Q. How do you know the price?

A. Fred Wilson told me himself. I did not have her listed for that. I had her listed at five thousand. He told me he got her for \$4,200. [165]

Q. What route was she on?

A. I do not think she was on any. I think she was laid up. That is my remembrance when she was sold.

Q. The present owner had no use for her?

A. I do not think he did; if he had he would not have sold her.

Q. He thought he could get a good price for her?

A. I would not consider that much of a price for that vessel. She cost about \$27,000.

Q. But the seller of that boat, you know he had no use for her at the time?

A. No, I do not know Scott's business.

Q. You knew she was laid up at that time?

(Testimony of Capt. Chas. E. Wilson.)

A. Well, I knew that he wanted to get rid of her, because he wanted to get rid of the whole of them. He ran her occasionally but I do not think she was on the route. At the time she was a spare boat.

Q. Do you know whether or not, if she was not on a regular run, and was laid up, that that would affect her sale price?

A. Well, not much, if she was in good condition. If anybody wanted her. Men who pay large sums of money for steamboats generally are capable of ascertaining the value of a boat whether she is laid up or on a run.

Q. What was this boat you speak of—

A. The "Nunivak."

Q. Did you know her when she was sold—who owned her? A. The United States Government.

Q. How long ago? A. Oh, about 1898.

Q. How old was she? [166]

A. Built in 1898. She was sold about 1901, I guess, then about 1903-4.

Q. Did you examine her?

A. Yes, sir. She laid in the Duwamish for two years.

Q. Was she sold through your office?

A. No, sir.

Q. What boats have you sold in recent years?

A. The last vessel I sold was the ship "Two Brothers."

Q. What kind of a boat was she?

A. A fourteen hundred ton ship.

Q. Where did you sell her?

(Testimony of Capt. Chas. E. Wilson.)

A. I sold her here in August of this year.

Q. What other boats have you sold recently?

A. I sold the tug "Redondo."

Q. When was that sold?

A. That was last spring. I sold the "Norman."

Q. What passenger vessels did you ever sell, either stern-wheel or other kind?

A. The "South Portland"; she was a passenger boat at that time.

Q. When was that sold?

A. About 1909. I could make out a list of these; I have sold a great many.

Q. Have you had many passenger vessels on your list for sale? A. Quite a number of them; yes.

Q. Is the market for these vessels necessarily restricted?

A. I would not consider for first-class vessels in propellers, modern, up-to-date vessels, there is a market most of the time.

Q. I suppose you are familiar with the passenger traffic on the Sound here? [167]

A. I ought to be in a general way, yes. In detail I do not know.

Q. Do you know any route upon which the "Telegraph" could be placed, that is not already occupied by an established route?

A. I do not. That is you mean placed successfully in a business way?

Q. Yes? A. No.

Q. That question will have an effect upon the market, of course.

(Testimony of Capt. Chas. E. Wilson.)

A. Why, the economy of the ship has first to be considered, anyone trying to make money anyway.

Q. Do you know whether any other change had been made in the engines, the compounding them, as has been testified here?

A. Other than compounding?

Q. Yes. A. No, sir.

Q. Do you know whether either one of the engines have been renewed within the last few years?

A. No, sir.

Q. Did you ever make borings in the hull of the "Telegraph" to know what condition she was in?

A. No. I have seen her since she was cut down, and was there when she sank.

Q. Are you a naval constructor?

A. No, sir. A practical man.

Q. Your experience in these matters has been confined to being master and ship broker? [168]

A. Well, I was brought up in a shipyard, sail loft, rigging loft.

Q. What do you mean by saying the "Telegraph" was a freak boat?

A. Because there was no other one I ever saw built like her. The stem comes back at the top, she has got a ram bow. And the stern dishes in and the circle of the wheel goes into it. She is longer on the bottom of the flanks than on the deck lines. These are conditions that I have never seen in any other stern-wheel boat.

Q. Does that reduce the value in any way?

A. It is hard to construct with a ram in a boat of

(Testimony of Capt. Chas. E. Wilson.)

that kind. The transom in the stern, you cannot construct that like you can with anything on the perpendicular, whether boat or house.

Q. You have testified in regard to certain other boats being speedier than the "Telegraph," and I believe you said that you did not know that of your own knowledge, but had heard from common report, etc., is that true?

A. Well, I have never sailed on the "Telephone" or the "Cochrane." I have sailed on the "Flyer."

Q. Is it not common report that the "Telegraph" carried a broom at her masthead, claiming the championship on the Willamette and Columbia rivers? Haven't you heard that?

A. I would like to have answered your other question a little further, if I could.

Q. Certainly, yes.

A. I think I read in the papers that the "Telegraph" was running on the Columbia river with a broom at her masthead. Now, a broom tacked to the masthead of a vessel is very immaterial, as to what she might be or might not be. [169] A man might do that on going into a new place, and there might be two or three other boats come along and beat him, and he could still carry that if they wanted that kind of advertisement. But the way to get at the speed is to know the weight, power and lines.

Q. Is not that true of all the reports you hear about the speed of vessels, just the reports? Are they not all subject to that criticism?

A. No, vessels have their record.

(Testimony of Capt. Chas. E. Wilson.)

Q. Do you know of your own knowledge what these records are?

A. Would you consider, if I said of my own knowledge, that I had to go on each vessel and take it myself?

Q. Yes.

A. No, sir. Neither does the President of the United States know what any man-of-war is doing. He takes the records and reports of experts for it to prove their revolutions and mileage. He cannot know of these things. He has to depend on other people who have taken them.

Q. Coming back to the "Nunivak," what did you say she was used for by the Government.

A. She was built for a combination of Revenue cutter and to transport troops up the Yukon river.

Q. Was she not used also as a survey boat?

A. Well, I do not think so. I think as a Revenue cutter when the river was new, that they were to make notes of the different sloughs or things on the river, and assist the coast survey as much as possible, as well as the geodetic.

Q. You went over this vessel?

A. Yes, sir. [170]

Q. She was built in a particular way for that service, was she not?

A. Oh, yes; she had thirty-odd staterooms and two or three large saloons.

Q. She would have to be completely overhauled to make her commercially available, reasonably so for commercial use?

(Testimony of Capt. Chas. E. Wilson.)

A. I do not think so. I think she was supposed to carry 2,000 troops on the Yukon.

Q. Would she have been suitable for Puget Sound in the condition which she was?

A. If any route had the business to justify a boat as large as that she certainly was. She was a pretty fast boat and extraordinarily well built, a well-constructed boat.

Q. In other words, in the buying of a boat of any size, a person in order to give anything like her value, would have to have a route to run her on in these waters?

A. I did not think you asked me about the values. That would not have anything to do with it. I testified previous to this that the value should be based on what the boat actually cost, and their size; if they are similar boats, one a third bigger would naturally cost about a third more.

Q. That is your primary element of value, what it cost to construct, of course taking other things into consideration.

A. Taking her original construction, the amount of money spent, and if she is built along the improved lines of construction and does not depart from that, there must certainly be a definite value, and the more material you [171], put in of the same quality and the more labor and stuff the more she will cost.

Q. Do you know anything about the earning capacity of the "Telegraph"?

A. No, I do not, but I guess it would be an easy matter to take care of the business on the route.

(Testimony of Capt. Chas. E. Wilson.)

Q. Do you know whether she has been a profitable boat?

A. I could not say whether she ever made a dollar; I never saw her books. Now, when there was good times it was possible for any boat; but she ought to have made a little money.

Q. Do you know whether the "Cochrane" was a boat that had an earning capacity?

A. The "Cochrane" of San Francisco, she was built for a railroad company to get entrance into San Francisco, and of course they built her so that no company would build anything to oppose her, and they did not try to. They used her until they got a right of way in and then they did not have any use for her.

Q. Do you know whether or not she made any money?

A. I never knew of a railroad boat or steamship to make any money, because if they made a ten dollar fare, the railroad would take all of it but fifty cents.

Q. I forget whether you testified as to the sale of the "Cochrane."      A. I had her for sale.

Q. You did not sell her?

A. No. I testified that I never sold a stern-wheel boat in my life.

Q. You just now testified that the railroad company got [172] ready to sell her because they had no further use for her?

A. That was reported to me.

Q. That, no doubt, affected the proposition given you to sell her; in other words, in no sense was it a

(Testimony of Capt. Chas. E. Wilson.)  
forced sale that they asked you to make?

A. Well, I don't know. You might consider it so when she dropped from \$85,000 to 15,000, there must have been more causes than one.

Q. Did not you think from the fact that they had no further use for it, that that would largely explain that great difference in value?

A. Other people might have use for her, other companies running in Sacramento river, operating boats, but not any where near as fast or elegant, and they did not want to buy her.

Q. Now, I have had difficulty in placing you. Are you the same Wilson known on the waterfront as Cyclone Wilson?

A. I think a few of my enemies, like Mr. Green, a few people who want to be insulting—

Q. A few enemies—are you an enemy of his?

A. —I would not do that for a minute.

Q. You think he is an enemy of yours?

A. Yes, sir.

#### Redirect Examination.

Q. (Mr. MERRITT.) Are you an enemy of Mr. Green's in any way?

A. I am not an enemy of Mr. Green; he was never able to hurt me or do me any good.

Q. You said you did not want to come to testify in this case [173] at all?     A. No, sir.

Q. And because you were told that you would be subpoenaed if you did not come, you came?

A. Yes, sir.

Q. Now, is it not a fact, Captain, that new routes

(Testimony of Capt. Chas. E. Wilson.)

are being established from time to time here, different places for vessels?

A. Oh, yes, in any growing country.

Q. And new boats being put on old routes?

A. Yes, taking the place of those too expensive.

Q. And sometimes opposition put on to the old routes? A. Yes, sir.

Q. There is nothing to stop one putting opposition on an established run, is there?

A. No, sir. There were not before this Interstate Commission they can come in but it takes more time.

Q. They can do it? A. Yes, sir.

Q. In Puget Sound waters anyone who wants to can put a vessel on a route that already has vessels on that route? A. Yes, sir.

Q. (Mr. ROBINSON.) Will you tell us where there is such a route where there would be a chance to put a vessel on, the size of the "Telegraph"?

A. That is not the question he asked me, a vessel the size of the "Telegraph."

Q. You did not answer that question with reference to putting [174] on a boat the size of the "Telegraph"? A. Nor any particular size.

Q. (Mr. MERRITT.) There is no reason why she could not go back on the Everett route, is there, Captain?

A. They could have put her on any route they wanted to.

Q. They could put her on the Paulsbo run?

A. Green has tried to make a monopoly of Puget Sound.

(Testimony of Capt. Chas. E. Wilson.)

Q. Green testified her principal value was to keep that monopoly. Would not this boat have similar value to somebody else to take that monopoly from him?

A. I think it would be an easy matter for you to put on any steamer, any economic boat, and take any route he has got. I think he is the most unpopular *one have* along the waterfront.

Q. If the "Telegraph" had such great value to the Inland Navigation Company to hold these routes, would she not also have a value to buy her and put her on some of these routes in opposition to the boats that are already on?

A. I do not think I get all that.

Q. If the "Telegraph" had such great value to keep the established routes, would she not also have a value for someone else to buy and put on and take one of these routes away from the boats already on?

A. Captain Green offered me an insult that works me up a little bit—

Mr. ROBINSON.—I move to strike that.

A. (Continuing.) It is an offense to me, and most any man who says it has to back it up. Several have been bunged up pretty bad on account of it, and I am ready to meet [175] anybody that wants to go on the street and calls me that.

Mr. ROBINSON.—I want this record to show that Captain Green has not said anything at this hearing.

(Testimony of witness closed.) [176]

[**Testimony of O. L. Hanson, for Claimant.**]

O. L. HANSON, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) Where do you live?

A. Paulsbo.

Q. What is your business? A. Engineer.

Q. Marine engineer? A. Marine engineer.

Q. What vessel? A. Steamer "Hyak."

Q. How long have you been a marine engineer?

A. About fifteen years?

Q. Were you ever engineer on the "Kitsap"?

A. Yes, sir.

Q. When? A. About two years ago.

Q. Were you on the "Kitsap" at the time the steamer "Telegraph" was running in opposition to her? A. No, sir.

Q. Have you ever been on the "Kitsap" as engineer when the "Kitsap" and "Telegraph" had a race? A. Yes, sir.

Q. More than once? A. Yes, sir.

Q. And where have you had these races?

A. West Point to Seattle.

Q. And which was the faster boat?

A. The "Kitsap."

Q. What was the maximum speed of the "Kitsap" at that time?

A. When she was new she made about 18 miles.

[177]

Q. You mean statute miles? A. Yes, sir.

Q. What was she making at the time she raced?

A. Around 17 miles.

(Testimony of O. L. Hanson.)

Q. And have you been on the "Kitsap" more than once in these races with the "Telegraph"?

A. Yes, sir.

Q. How much have you beat her from West Point in to Seattle?    A. About half a mile.

Q. How far is it from West Point into Seattle?

A. Seven miles.

Cross-examination.

Q. (Mr. ROBINSON.) How many of these races took place?

A. I could not tell exactly. Two or three anyway.

Q. How do you know they were races?

A. Most generally can tell that from the way the boat smokes and the way she travels through the water.

Q. Did you have any agreement to race?

A. Agreement with who?

Q. The "Telegraph"?    A. No, sir.

Q. How do you know the "Telegraph" was actually racing?    A. What I told you, from her smoke.

(Testimony of witness closed.) [178]

[Testimony of O. Anderson, for Claimant.]

O. ANDERSON, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) What is your business?

A. Marine fireman.

Q. What boat?    A. Steamer "Hyak."

Q. Were you ever fireman on the "Kitsap"?

A. Yes, sir.

Q. Were you fireman on her at any time when she raced or running the same way as the "Telegraph,"

(Testimony of O. Anderson.)

near her? A. Yes, sir.

Q. And did the two boats have a race?

A. Yes, sir.

Q. Which was the faster boat?

A. The "Kitsap."

Q. Where did they race?

A. From West Point to Seattle.

Q. Were you there when Hanson was the engineer? A. Yes, sir.

Q. How much did the "Kitsap" beat the "Telegraph" from West Point?

A. About a quarter of a mile or half a mile.

Q. How could you tell whether the "Telegraph" was trying to beat the "Kitsap"?

A. Well, saw her smoke, black smoke rolling out of her stack.

Q. Did she smoke heavier than other times?

A. Yes, sir.

Q. Go through the water any different?

A. Yes, we were behind her and we gradually crawled up on her and we could see her begin to smoke. [179]

Q. And you were able to pass her? A. Yes, sir.

#### Cross-examination.

Q. (Mr. ROBINSON.) What is the distance from West Point in here?

A. Supposed to be seven miles.

Q. How far do you claim the "Kitsap" beat the "Telegraph" at that time?

A. Well, I don't know just how far. I would say a quarter of a mile or a little more.

(Testimony of O. Anderson.)

Q. At least a quarter of a mile?    A. Yes, sir.

Q. You are a fireman?    A. Yes, sir.

Q. Did you get out of your station to see this?  
Could you see it from where you were at work?

A. I got right out and looked at it.

Q. You were not on duty?

A. I was on duty, too, you bet.

(Testimony of witness closed.)    [180]

[**Testimony of O. L. Hanson, for Claimant  
(Recalled).]**

O. L. HANSON, recalled for further cross-examination.

Q. (Mr. ROBINSON.) Are you financially interested in the Kitsap County Transportation Company?    A. Yes, sir.

Q. Do you know whether or not there has been litigation between the libelant here and your company, extending over a period of a couple of years?

A. Yes, sir.

Q. You testified in that suit, which was a suit concerning a collision between the "Kitsap" and "Indianapolis"?    A. Yes, sir.

Redirect Examination.

Q. (Mr. MERRITT.) Does the fact that the company in which you have some small interest has had litigation with the owner of the "Telegraph," in any way influence your testimony as to the race with the "Kitsap" and "Telegraph"?

A. I do not understand you.

Q. Does the fact that the Kitsap Transportation

(Testimony of O. L. Hanson.)

Company has had litigation with the owner of the "Telegraph," in an entirely different matter, have any influence on your testimony as to this race that the "Kitsap" and "Telegraph" had? A. No, sir.

Q. You came here to testify that the "Kitsap" could beat the "Telegraph." If she had not and could not, merely because there has been litigation between the Kitsap County Transportation Company and the owner of the "Telegraph," would that make any difference—in other words, if she had not, you would say so? [181]

A. I know she can beat her anywhere.

Q. You say she beat her half a mile on this occasion? A. Yes, sir.

(Testimony of witness closed.) [182]

[**Testimony of George N. Skinner, for Claimant.**]

GEORGE N. SKINNER, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) Your name is George N. Skinner? A. Yes, sir.

Q. What is your business?

A. I am in the lumber business and transportation business.

Q. In Seattle? A. Yes, sir.

Q. How long have you been engaged in that business?

A. Several years here, close to seven years.

Q. Do you know the steamer "Telegraph"?

A. Yes, sir.

Q. How long have you known her?

(Testimony of George N. Skinner.)

A. The first time I ever saw her was when she came back from the Columbia river. She came back to go on the "Bremerton" run.

Q. Have you ridden on her? A. Yes, sir.

Q. And generally familiar with her construction, power, etc.?

A. I do not know anything about her construction or power. I never examined her for any purpose to find out.

Q. You know generally how she is constructed, that she is a stern-wheel vessel.

A. She is a stern-wheel vessel. That is practically all I do know about her, other than her speed.

Q. Now, are you familiar with the different uses to which vessels of her kind can be put in Puget Sound and other waters?

A. I have absolutely no knowledge of the operation of stern-wheel boats. I have never been connected with the [183] operation of a stern-wheel boat.

Q. You do know that stern-wheel boats are used in Puget Sound?

A. I presume I know every one that is in operation on the Sound.

Q. Are there stern-wheel boats operated on the Sound? A. There are others, yes.

Q. Also on the Columbia river and Willamette river?

A. Yes, sir, quite extensively on both of them.

Q. And also on the Sacramento and San Francisco bay? A. Yes, sir.

Q. Also Alaska? A. Yes, sir.

(Testimony of George N. Skinner.)

Q. I will ask you whether or not it would be possible to take the "Telegraph" to any of these other places to be used?

A. Well, that I assume, would be governed by where she was going to go, the depth of draft, etc., would have something to do as to whether she would be available. She would not be available on some streams in Alaska. She would not be available on some portions of the Columbia river, I presume on account of her draft. They build boats specially designed for different rivers. Stern-wheel boats run up the Skagit river and they do not draw more than two feet or two feet and a half of water.

Q. She could not be used there but she could be used on the lower Columbia.

A. I do not see any reason why she could not be used on the Columbia river.

Q. Could they use her on parts of the Willamette?

A. Yes, could be used where deep enough for her draft. [184]

Q. She could be used on Puget Sound?

A. Yes, sir.

Q. Or in San Francisco Bay?

A. Yes, I presume so. I do not know how seaworthy. They have more to contend with in San Francisco bay on account of the roughness there than we do here.

Q. Now, could she, in that connection, be used as a towboat?

A. Well, as I said before, I never had any knowledge of the operation of a stern-wheel boat. I do

(Testimony of George N. Skinner.)

not know what the expense would be. It seems to me she would be rather large for a towboat. Still she might be operated successfully cut down. There is considerable difference between the two, the fuel cost and operating generally, where they are utilized for that kind of purpose.

Q. You are the owner of a stern-wheel boat now, are you not? A. No, sir.

Q. You have been? A. Never have been.

Q. Did not you purchase or have something to do with the sale of the "Vashon"?

A. I bought the remains of the "Vashon," about thirty feet out of water out here.

Q. You do not call that a boat?

A. I speculated, went out there and bought in the lump.

Q. She was a stern-wheel boat? A. Yes, sir.

Q. Had been sunk?

A. Yes, burned and sunk near Anacortes. [185]

Q. I will ask you whether or not from your knowledge of shipping on Puget Sound and other waters where the "Telegraph" might be used, there would be any market for a vessel of her kind at the time?

A. The "Telegraph" has been in service all the time that she has been on the Sound. She might have been laid up temporarily for short periods of time, but I think she has been in operation pretty nearly constantly since she came up here.

Q. She is a boat that could be operated on almost any of the lines on Puget Sound? A. I think so.

Q. And, in your opinion would there be any

(Testimony of George N. Skinner.)

market for a vessel of that kind at the time she was sunk?

A. I do not know why, if Mr. Green could utilize her, if someone else had a place to put her, they could not operate her to the same advantage that he could operate her.

Q. Was there anything to stop anyone putting another vessel on any of the lines on Puget Sound?

A. I imagine there would not be a market for her on the marked competition for that class of vessel at that time that there would be for a propeller boat, because they are a little out of date. They might, however, be better for some certain purposes than the propeller boat.

Q. Then, would there be any market, in your opinion—what would be your opinion about it, whether there would be any market for vessels of her class?

A. There is always a market for any type of vessel. Somebody has an idea that they can do better with a boat [186] than the other fellow. It depends on the price. I think the "Telegraph" would have some value on the Sound at any time.

Q. And would have it.

A. Known as she was. None to-day.

Q. She would have had at the time she was sunk.

A. Yes, sir.

Q. And you think even in the condition she is to-day that she has some value?

A. I tried to buy her recently. She was offered to me recently.

(Testimony of George N. Skinner.)

Q. In what condition was she when offered to you?

A. Rebuilt, new house entire and put in just as good condition as was possible to put her in.

Q. At what price?

A. Nineteen thousand dollars.

Cross-examination.

Q. (Mr. ROBINSON.) Mr. Skinner, who offered her to you? A. Mitchell and Longstretch.

Q. Do you know where they acquired her?

A. I understood they bought her from—I really do not know who she belonged to or who they bought her from. I simply know they claimed to own her.

Q. Now, do you know the history of the "Telegraph"? Have you known about her since she was built?

A. I do not know about her other than just what I knew of her in competition on the Bremerton run when I was operating over there. That is all I know.

Q. You do not know who built her or when or for what [187] purpose?

A. I know the statement is commonly made that Scott built her.

Q. And she was built specially for the Everett run, was she not?

A. I don't know; that was away before my time here.

Redirect Examination.

Q. (Mr. MERRITT.) You say that she was running in opposition to you on the Bremerton run?

A. Yes, sir.

(Testimony of George N. Skinner.)

Q. For how long?

A. I do not remember the number of months that they were operating there; several months.

Q. Do you know what speed she was making when you were running there?

A. She was able to beat the "Monticello."

Q. About how much?

A. Our running time over there was 52 to 56 minutes, depending on the tide. I have timed the "Telegraph" going over there, and she made it in forty-nine minutes. Her time usually was 51 to 54 minutes.

Q. You were operating the "Monticello" on that run and she was run in opposition? A. Yes, sir.

Q. The "Monticello" was a propeller boat?

A. Yes, sir.

Q. Was she a new boat?

A. Practically new; a year and a half or two years old. [188]

Q. (Mr. ROBINSON.) Mr. Skinner, is it not true that on the Bremerton run, there are a great many turns, and that the tide is a very great factor at certain times? In other words, what I want to get at, is that really a good place to figure out the speed of a boat as to her time on that run?

A. Well, I don't know. I am not familiar enough with the course over there. It is a crooked course, a good many turns, etc. However, these turns are long and there is plenty of room to navigate. There is only one place where I imagine the current would interfere, perhaps, with the operation, but to what

(Testimony of George N. Skinner.)

extent I am not familiar. That is going through the narrows. That is not a very great distance, only a short distance.

Q. Of course you do not know whether the operators of the "Telegraph" were pushing her at top speed or what speed they were trying to make on that route?

A. Why, I assume they were running as fast as they could at times. I don't know; the tide might have been favorable when they made that in 49 minutes. I have stood on the forward end of the "Monticello" frequently and watched them run, and when they were forcing the draft by putting steam into the stack, I assumed that they were trying to run.

Q. Now, do you know what the history of the "Telegraph" has been for the past eight or nine months? You know that she had been sunk before she was offered to you for this nineteen thousand dollars, don't you, and declared a wreck?

A. I know. [189]

Q. Do you know that she had been abandoned by the underwriters previous to this time.

A. I do not, only from hearsay.

Q. Mr. Skinner, you have testified that the "Telegraph" might be used on other routes on the Sound, probably most of them, I presume. Do you or do you not think that the "Telegraph" would be of more value to the Inland Navigation Company than to anybody that could afford to pay for her, on account of the conditions here?

(Testimony of George N. Skinner.)

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial and not proper cross-examination.

Q. On account of them having so many routes in operation?

Mr. MERRITT.—I object as not proper cross-examination and as not a proper element of damages in this case.

A. Well, that is a rather peculiar question to answer. I do not know whether she would be any more valuable than some of the other boats they have got to utilize for the same purpose.

Q. The question was, would not the "Telegraph" be more valuable to them than to any possible purchaser that you could think of?

Mr. MERRITT.—I renew my last objection.

A. As I understand it, I want to be perfectly fair, and I do not want to undertake to say something here that is not fair to both sides. I assume that Mr. Green is getting rid of that class of boats. He is building an entirely different class of vessels, building as rapidly as he can to cover the different routes, and I would assume that that class of vessel is not of the class that he wants. [190]

Q. Mr. Skinner, you have been in the transportation business here. It is a pretty heavy undertaking to start a new route, is it not?

A. Well, it usually takes quite a period of time, patience and experience and money.

Q. Usually means a fight for somebody, don't it?

A. As a rule.

(Testimony of George N. Skinner.)

Q. Now, you have spoken of a market for this vessel. The bidders in that market, under the conditions here, would have to be someone starting a new route, would they not, or going into competition?

A. Yes, unless someone would buy to put on a route they already have. There have been other routes operated on the Sound.

Q. Do you not think that the "Telegraph" would have greater earning power in possession of the Inland Navigation Company than for any other purchaser that you could think of?

Mr. MERRITT.—I renew my former objection.

A. That is something that I do not know how I could answer with any degree of fairness or truthfulness, because I don't know. That is a thing I have no way of knowing.

(Testimony of witness closed.)

Hearing adjourned. [191]

Seattle, Wn., Jan. 23, 1913.

Present: Mr. ROBINSON, for the Libelant.

Mr. MERRITT, for the Claimant.

[Testimony of Capt. William Williamson, for  
Claimant.]

Capt. WILLIAM WILLIAMSON, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) You reside in Seattle, Captain? A. Yes, sir.

Q. How long have you lived here?

A. Oh, somewhere between 45 and 50 years.

Q. What is your business?

(Testimony of Capt. William Williamson.)

A. Steamboat master.

Q. What papers do you hold?

A. Puget Sound and its tributaries.

Q. How long have you held papers?

A. My last number on my license was 24 or 25. I have had it about 34 or 35 years.

Q. You have been a master mariner under these papers for 34 or 35 years? A. Yes, sir.

Q. Were you ever master of the "Flyer"?

A. Yes, sir.

Q. How long? A. Seven years, pretty near.

Q. About what years?

A. I was in her in 1890, along there. I was in her between six and seven years.

Q. 1890? A. Yes, sir.

Q. Do you know the steamer "Telegraph"?

[192] A. Yes, sir.

Q. Were you running as master of the "Flyer" when the "Telegraph" was first built?

A. Yes, sir.

Q. So that if the "Telegraph" was built in 1903, it was probably 1900 that you were on the "Flyer"?

A. Yes, sir.

Q. About 12 or 13 years ago?

A. Yes. I was on the "Flyer" when she came out.

Q. When she came out?

A. The "Telegraph" came out.

Q. How long had the "Flyer" been running when you went on her?

A. She was built in 1891, I think.

(Testimony of Capt. William Williamson.)

Q. The "Flyer" is a propeller boat, is she?

A. Yes, sir.

Q. Do you know what her horsepower was?

A. She developed about 1200 horsepower. She had more in her but she had about 1200 that she could get hold of.

Q. Did you operate the "Flyer" on the Seattle-Tacoma run?

A. Yes, altogether. Only once in the seven years that we were off the run, and that was to go to Richmond beach to get wood.

Q. During that time have you ever operated her at her maximum speed?

A. No. That is as far as the engines were concerned. She never had boiler enough to put the engines up to their full power.

Q. Did you ever operate her as fast as her boiler capacity would permit?

A. Yes, as far as I know. [193]

Q. Now, what is the fastest time you were ever able to make between Seattle and Tacoma?

A. The best time the "Flyer" ever made while I was on her was when they put the present boiler in her. It was put in in Tacoma. We had been up to Tacoma a couple of months refitting her, and she had no chairs in her, no boats or life rafts, that was all cleaned out and in the warehouse, and she came down in an hour and twenty-six minutes from dock to dock.

Q. Was she in condition then to make her best time? A. Yes, she was light and clean.

(Testimony of Capt. William Williamson.)

Q. Did you try to make the best time with her that trip?

A. Yes. Mr. Sutton was chief engineer at that time and he used to take pride in her speed.

Q. Now, you say from dock to dock; does that include the turns?

A. Yes, from the time I left the dock. We came down from the creek up at the head of the bay, she was away up to the creek there above the bridges, and when she came down she was headed out. We landed at the N. P. dock and we lay there an hour, and we turned her loose from the dock there for Seattle.

Q. And you made it in an hour and twenty-six minutes? A. Yes, sir.

Q. Were you master of the "Flyer" at the time she had a race with the "Telegraph" from Duwamish Head to Alki Point? A. Yes, sir.

Q. State what the conditions of that race were, and what condition the "Flyer" was at that time.

A. Of course, I never considered it any kind of a fair race. [194]

Q. Why not?

A. Because the "Flyer" at that time, the condensers were leaking bad, and as soon as she opened up she was not making her usual time. Her condensers were leaking bad and she was foaming bad. In going across the bay the engineers telephoned to me to keep away from her if I possibly could because she was foaming bad and in no condition for a race. But how could I? She was out there and wanted to

(Testimony of Capt. William Williamson.)

run and I had to, I was bound to, I was going to Tacoma.

Q. And the "Telegraph" in that race threw some of her paddles?

A. She came out to us off the buoy and we held her down until we got to about Alki point, when we came to the point she came up and in rounding the point she probably gained on us a half a length, and she ran up about a mile further and she probably gained another half length, when she began to throw her buckets off and then she quit. She never got thoroughly by us. When her buckets began to fly her wheel was right abreast the pilot-house; I recollect it well.

Q. Now, you have known the "Telegraph's" time at other times?

A. No, never have. All I know is that one time.

#### Cross-examination.

Q. (Mr. ROBINSON.) Captain, when you gave the time from Tacoma to Seattle as from dock to dock, do you mean actually from leaving the dock, or when you were hooked on?

A. From the time I left the dock.

Q. Until you were tied up to the dock here?

A. Yes, that is the only time I was ever on her when she went out that way. She came down the creek and was lying there [195] at the east end of the N. P. dock, heading out. So when we pulled out from the dock and got the stern clear so that the wheel would not hit the piles, she got the ginger. It

(Testimony of Capt. William Williamson.)  
was understood with Sutton that he would turn her loose.

Q. Do you know how many statute miles it is?

A. A little over 28; about 28 miles.

Q. Did you testify that her horsepower fully developed was 1200?

A. That is all I know about it, the engineer saying that that was what they generally had on the Tacoma run. That is what Sutton used to tell me. That is what Hill, the Chief, told me she would develop 1200.

Q. Could it by any possibility be 2,500?

A. I mean 1200 horsepower. But they always said they had a big credit back of that. The engines off the "Flyer" were off a yacht in New York harbor that was developing 2,500 horsepower every time she went out. That there was always that reserve. Vanderbilt's yacht or somebody's yacht in New York had had that same power.

Q. Now, how long a time would be consumed in getting away from the dock and landing on that trip you speak of? A. In Tacoma?

Q. From Tacoma to Seattle.

A. That trip, you mean?

Q. Yes.

A. There was not much of any time hardly in Tacoma. She was lying at the dock head out, she was lying at the end of the dock in Tacoma, and just as soon as she got a length from the dock so that the propeller would not hit, she got the [196] ginger.

Q. Coming in, how much time?

(Testimony of Capt. William Williamson.)

A. Her average time was about three minutes. I have docked her in less than two and a half from full speed ahead until she was dead stopped.

Q. Captain, do you feel qualified to say how much horsepower the "Flyer" could have developed?

A. No, because all I know about it is what the engineers told me when I was there.

Q. Then did the engineers tell you that 1,200 was about what she did develop?

A. What she would average on her best run—her day's runs.

#### Redirect Examination.

Q. (Mr. MERRITT.) Captain, in your opinion, could the "Flyer" at any time, when you were master of her, with the boiler capacity she had, have made a speed of 20 statute miles an hour, without the aid of the current? A. No, sir.

(Testimony of witness closed.) [197]

#### [Testimony of Capt. S. B. Gibbs, for Claimant.]

Capt. S. B. GIBBS, a witness called on behalf of the claimant, being duly sworn, testified as follows:

Q. (Mr. MERRITT.) Your name is S. B. Gibbs?

A. Yes, sir.

Q. You reside in Seattle? A. I do.

Q. How long have you resided here, Captain?

A. Nearly 11 years.

Q. What is your business?

A. Agent and surveyor for the San Francisco Board of Marine Underwriters.

Q. How long have you been engaged in that business? A. Nearly 11 years.

(Testimony of Capt. S. B. Gibbs.)

Q. Here in Seattle? A. Yes, sir.

Q. What was your business before that?

A. Master mariner.

Q. Now, in your business as surveyor and agent for the San Francisco Board of Marine Underwriters, do you have occasion to survey vessels?

A. I do.

Q. And to determine their value and the cost of vessels? A. I do.

Q. Are you acquainted with the routes that vessels are used on, on this coast?

A. I am to a certain extent.

Q. Your duties as a surveyor for the Underwriters, would necessarily, would it not Captain, require you to be familiar with all classes of vessels and the use of vessels, the cost of constructing and repair of them and [198] their value.

A. They would.

Q. Did you ever make a survey of the "Telegraph"? A. I did.

Q. After she was in collision?

A. After she was in collision with the "Alameda."

Q. Are you familiar with the vessel?

A. Yes, sir.

Q. Do you know what kind of decks she had?

A. Her main deck was beaded, I think inch and a quarter decks.

Q. Were they caulked? A. No.

Q. What do you mean by beaded?

A. Tong and grooved.

Q. Tonged and grooved flooring.

(Testimony of Capt. S. B. Gibbs.)

A. Yes, heavy flooring; it was heavier than ordinary flooring.

Q. Do you know how she was constructed?

A. Yes, sir.

Q. Was she a light or heavy constructed vessel?

A. Why, her upper works were very light, the house; the hull was a well-constructed hull.

Q. Who, if anybody, was with you on this survey?

A. Captain Logan, representing Lloyd's, underwriters, and Mr. Fowler.

Q. Who did Fowler represent?

A. Surveyor to Lloyd's agents.

Q. Did you make a thorough examination of her?

A. We did.

Q. Could you, from your examination and your knowledge of the [199] vessel, give an opinion as to the value of the vessel before she was sunk?

A. Would that mean her market value?

Q. Yes, sir. A. I think I could.

Q. What, in your opinion, would be the fair, reasonable market value of the "Telegraph" before she was sunk? A. I should say about \$25,000.

Q. Was she a practical boat for carrying freight or towing? A. No, I do not think she was.

Q. Built principally for speed, was she not?

A. Speed and passenger trade.

Q. You never timed her to know her speed?

A. No, I never did.

Q. After she was sunk did you have anything to do with the "Telegraph"?

A. We made out specifications for the repairs,

(Testimony of Capt. S. B. Gibbs.)  
surveyed the vessel.

Q. Did you have anything to do with trying to sell the wreck?

A. Yes, I was asked to try to dispose of the vessel.

Q. And did you dispose of her? A. I did; yes.

Q. Are you familiar with the routes of vessels on Puget Sound the different routes?

A. To a certain extent, yes.

Q. It is a fact, is it not, that there are a great many different routes on Puget Sound for vessels?

A. There are.

Q. And are there more than one route upon which the vessel—a vessel like the "Telegraph" could have been operated? [200]

A. Yes, there were several routes.

Q. How about British Columbia—are you familiar with that, are there any routes where she could be used there?

A. I imagine there are from the fact that I asked Captain Crosby at the time he thought he had bought the vessel from Mr. Green, what he was going to do with her, and he said he thought he could sell her over in Vancouver, that there would be a market for a vessel of that kind in Vancouver, and if he was not able to dispose of her there he thought he could do well with her in San Francisco.

Q. You resided for sometime at Crystol Springs, did you not? A. Yes, sir.

Q. On the route to Bremerton from Seattle?

A. Yes; the greater portion of the way.

Q. And have been back and forth over that route

(Testimony of Capt. S. B. Gibbs.)

a great deal? A. Yes, sir.

Q. Do you know anything about the tides on that route?

A. Yes, the tides run very strong over certain portions of the route.

Q. And where is that, around Bainbridge Island?

A. It is between Bainbridge Island and the mainland.

Q. About how strong does it run at times there?

A. I should think they run there as high as five miles an hour.

Q. It has been claimed in this case, Captain, that the "Telegraph" had an especial value to the libellant in this case, because it could use her to run out competition, put her on other routes and break companies or people who were operating on these routes. I will ask you whether or not, in your opinion, if the vessel had such a value [201] for that purpose, she would not also have a value for any other person to put on a route for that purpose, a value to a person having such a route to put on a route to hold the business of the route.

A. I think she would.

Q. Then, in your opinion, would the vessel have an especial value only for the libellant in this case for such purposes, or would she have a value for other people?

A. I think she would have a value for other people too.

Q. When you were trying to sell the wreck, did you have inquiries from more than one person on

(Testimony of Capt. S. B. Gibbs.)

the wreck? A. Had offers from more than one.

Q. So that the sale that was made was not the only person to whom you could have sold for some price?

A. No. One party seemed to feel hurt that he was not notified that the wreck was for sale. He said he would like to have got hold of the boat to operate.

*Redirect Examination.*

Q. (Mr. ROBINSON.) Captain, who were you representing when you made this survey?

A. I was representing the underwriters.

Q. Was that after the wreck?

A. After the wreck, after the vessel was raised.

Q. Were you representing these underwriters who had insurance on the vessel, and were therefore interested in the value which should be placed upon her?

A. I was representing the underwriters who had insurance on the vessel.

Q. And who presumably will contribute in case judgment is [202] secured in the case which we are now trying? A. Yes, I presume so.

Q. Did you report to them that the value of this vessel was \$25,000?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial under the issues in this case.

A. No, I do not think I did.

Q. Did the nature of your employment require you to inform them as to the value of this vessel?

Mr. MERRITT.—I renew my last objection.

(Testimony of Capt. S. B. Gibbs.)

A. Well, not unless I was asked to give the value of her.

Q. I will ask you directly, did you give the underwriters a valuation on that vessel?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial; and it is a privileged communication between the witness and the parties he represented.

A. I am not quite sure whether I gave the underwriters a valuation or not. I do not remember whether I did or not. I remember I gave them an estimate of about what the vessel would cost.

Q. The "Telegraph" was a passenger boat, primarily, was she not, Captain?     A. She was.

Q. And persons who would desire to buy her would probably be found among persons who desired to operate her as a passenger boat?

A. Mostly passengers, yes; she was not adapted to carrying very much freight; might carry a little.

Q. At the time she was wrecked she was operated by the Inland Navigation Company on the Seattle-Everett route? [203]     A. I think she was, yes.

Q. And the Inland Navigation Company has a number of other routes on the Sound?

A. Yes, sir.

Q. Taking that into consideration, and the whole general condition surrounding the passenger traffic here, would you say that the "Telegraph" fell within that class of articles which are sold from day to day, so that frequent, current market transactions would enable the owner, if he desired to sell, to obtain a

(Testimony of Capt. S. B. Gibbs.)

fair value for her?

A. I do not think these transactions are taking place from day to day. It might be a case of holding a vessel for sometime before he could sell her.

Q. I say, taking a reasonable time. I will put the question in a shorter form. Is there such a market here, Captain, that if the Inland Navigation Company had placed this vessel on the market that it could within a reasonable time secure a fair value for her?

A. That would depend on what they call a fair value of the vessel. Vessels have sold of her class, frequently. The "Telephone" was sold over in Portland for \$24,800 and the "Charles R. Spencer," similar to the "Telegraph," licensed to carry 600 passengers, was sold for \$20,000, and it would appear to me that there must be a market for this kind of boats. You may have to hold them sometime before you find a purchaser.

Q. Well, in a sense, Captain, there is a market for everything. A. Yes, sir.

Q. As one of the witnesses has already testified in this case, that somebody would buy a vessel for junk at least. [204] What I want to get at, is there such a market and open enough, that is, are there sufficient bidders so that the price which would be realized in that market would fairly represent the value of that vessel?

Mr. MERRITT.—I object as calling for a conclusion of the witness as to the value. Our position is that the value of the vessel was the market value, if

(Testimony of Capt. S. B. Gibbs.)

she had a market value, and it makes no difference whether that market value was what she would cost to build anew, or any other price.

Q. Captain, there are some articles for which there is a limited demand, and which may have certain special characteristics, which could not be sold in the market for their real value, are there not?

A. Yes, I presume there are.

Q. Did not the "Telegraph" have a special value on account of her speed?

A. She had more value on account of her speed than a slow boat would have.

Q. Did she not, in your opinion, have a special value to the Inland Navigation Company, because of the fact that they owned so many routes upon the Sound?

A. I do not think I am in a position to pass on a question of that kind, as to what the value was to the Inland Navigation Company. I do not know what the value was to the Inland Navigation Company.

Q. Are you prepared to say whether or not, from your general knowledge, that that value would probably be or not, higher than could be secured for her in such a market as we have here?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial. [205]

A. I do not think I can answer that question. As I said before, I do not know what it was worth to the Inland Navigation Company; I have no way of knowing. I have given the market value. I tried

(Testimony of Capt. S. B. Gibbs.)

to be as fair as possible and guided by the sale of other boats.

Q. Captain, where did you acquire your knowledge about the sales which you have testified to, that is, of the "Spencer" and the "Telephone"?

A. I wrote over to our surveyor in Portland and asked him to let me know of any transfers that had been made of stern-wheel steamers within the last year or two; that I would like to know what they sold for. I have a copy of his letter in my pocket.

Q. Captain, is it not true that after making your survey of the "Telegraph," after she was wrecked, that you recommended to the Underwriters—having surveyed the boat and having ascertained her value in your opinion, that they should pay to the Inland Navigation Company \$36,250, and give them the wreck?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and is an attempt to show negotiations for a settlement of this matter, which is entirely improper.

Mr. ROBINSON.—This question is not asked for the purpose of showing negotiations of settlement, but asked for the purpose of throwing light upon this witness' opinion of the value of the vessel.

A. Yes, I recommended, with Captain Logan, a settlement for that amount, for the reason that we took the value of the "Telegraph" into consideration, and we were under the impression [206] that the "Alameda" owners would be liable to a big demurrage claim; and then, there was the lawyers' fees,

(Testimony of Capt. S. B. Gibbs.)

that we knew would be very heavy, and other expenses, and we thought it would be better to recommend a settlement to avoid a lawsuit and avoid the demurrage.

Q. Captain, you say you thought there would be a big demurrage claim. Does that mean that you thought that the "Telegraph" was making money?

A. No. That is not the reason. We thought there would be a demurrage claim put in.

Q. Not necessarily substantiated? A. No.

Q. What do you mean by demurrage, Captain?

A. Money paid for the loss of time of the vessel.

Q. Captain, you itemized that recommendation. How much did you think that demurrage claim would amount to?

A. I do not remember the exact amount, but we figured that the "Telegraph" would be out of commission in the neighborhood of three or four months before she could be turned over to the owner. I do not remember the exact time.

Q. Do you know about how much a day you figured on that demurrage?

Mr. MERRITT.—Let it be understood that this line of testimony is all subject to my objection.

A. My best recollection is that we figured a hundred dollars a day. [207]

#### Redirect Examination.

Q. (Mr. MERRITT.) Did you base your figures, Captain, on any knowledge of what the "Telegraph" was worth or what she might be earning, or what you simply figured the claim would be?

(Testimony of Capt. S. B. Gibbs.)

A. We figured the claim would be that. We had no way of knowing what she was earning.

Q. The fact is she had been laid up all winter?

A. She had been laid up but I do not know how long.

Q. And had only been in commission about three weeks, as Mr. Green has already testified.

A. I do not remember the exact time. I know she was laid upon some time.

Q. Now, did this recommendation that you made, was that what you then considered or now consider to be the value of the vessel, or was it simply a recommendation for a settlement of this controversy?

A. A recommendation for a settlement of the controversy.

Q. And state whether or not that recommendation was made, based upon an offer which had been made by the Inland Navigation Company to settle for that amount. A. I think it was.

Q. And you simply recommended that offer to be accepted to avoid a lawsuit and avoid the expenses of lawyers? A. Yes, sir.

Q. And to avoid any question of demurrage?

A. I did.

Q. And not because you consider that the value of the vessel? A. No.

Q. Now, you have been asked as to the value of the vessel on [208] account of her speed. I will ask you whether or not this vessel if she was not either the fastest stern-wheel vessel on the Sound

(Testimony of Capt. S. B. Gibbs.)

or that was available, to put on the Sound, or the fastest vessel that was operated on these different routes, would have an especial value on account of her speed?

A. She would have more value on account of her speed.

Q. Would it not require her to have the greatest speed of any vessel on the routes to have any great value on account of her speed, being constructed solely for passengers?

A. That would make a difference in her value.

Q. Then if she was not the fastest stern-wheel vessel, or the fastest vessel operated on these routes, or that was available to put on the routes, she would not have this excessive value on account of this speed? A. No.

Q. You said the Inland Navigation Company has different routes on the Sound? A. Yes, sir.

Q. Is it not a fact that they are constructing new vessels to put on these routes all the time?

A. They are.

Q. Of a different type, too? A. Yes, sir.

Q. Constructing iron propeller boats?

A. Yes, sir.

Q. And is it not a fact that they have several stern-wheel vessels that are laid up a good share of the time?

A. They have one stern-wheel steamer that is laid up. [209]

Q. And they have other stern-wheel vessels that are being operated?

(Testimony of Capt. S. B. Gibbs.)

A. I think that is the only stern-wheel steamer, the "State of Washington," I think that is the only one.

Q. You say you had no means of knowing anything about whether she was making money?

A. No.

(Testimony of witness closed.)

Hearing adjourned until January 27, 1913, at 1:30 P. M. [210]

Seattle, Washington, January 27, 1913.

Present: Mr. ROBINSON, for the Libelant.

Mr. MERRITT, for the Claimant.

**Libelant's Rebuttal.**

[Testimony of Capt. Z. B. Murry, for Libelant (in Rebuttal).]

Capt. Z. B. MURRY, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your occupation?

A. Master mariner.

Q. What license have you?

A. Master Puget Sound to the sea.

Q. How long have you been a master mariner?

A. Fourteen years.

Q. Have you ever been master of the "Telegraph"? A. Yes, sir.

Q. What times, about?

A. Oh, since 1910, off and on right along since 1910.

Q. At the time you were master did you have a race with the "Kitsap"? A. Yes, sir.

Q. When was that, as near as you can remember?

(Testimony of Capt. Z. B. Murry.)

A. In the spring of 1910.

Q. Where did that take place?

A. Between Seattle and Edmonds.

Q. Did you beat her?      A. Yes, sir.

Q. How much?

A. About four or five lengths.

Q. How far is it from Seattle to Edmonds? [211]

A. Eighteen miles.

Q. Do you know the time you made on that occasion?      A. 56 minutes.

Q. That would be about how much per hour?

A. A little better than 19.

Q. Do you know what condition your boat was in at that time?

A. She had not been on the drydock for some time. She could have been trimmed more by the head to make better time.

Q. Captain, do you know whether or not the "Telegraph" had been reputed to be the fastest stern-wheeler in the world?

Mr. MERRITT.—I object as incompetent, irrelevant and immaterial, and hearsay evidence.

A. Yes, sir.

Q. Do you think the "Telegraph" in proper condition could make twenty miles an hour?

Mr. MERRITT.—I object as leading.

A. Yes, sir.

Cross-examination.

Q. (Mr. MERRITT.) What time of year was this race with the "Kitsap"?      A. 1910.

Q. What time of the year?

(Testimony of Capt. Z. B. Murry.)

A. I don't know exactly. It was the time the "Kitsap" and the "City of Everett" were running to Bellingham.

Q. In the summer, spring, fall or winter?

A. In the spring. [212]

Q. What time in the spring?

A. Along in April or May some time, I think.

Q. Where did the race commence?

A. At Seattle.

Q. What place in Seattle? A. Colman dock.

Q. Started at the Colman dock? A. Yes, sir.

Q. You were berthed at the Colman dock?

A. Yes, sir.

Q. Where did the "Kitsap" berth?

A. "Flyer" dock.

Q. Where was the "Flyer" dock with reference to the Colman dock? A. Next dock north.

Q. Which boat left first?

A. The "Telegraph" backed out from the slip and lay bow in backed out from the slip and we got on the course and the "Kitsap" was on our port quarter, at the engine-room door.

Q. Did you say anything to the master of the "Kitsap" before you started that you were going to race? A. No, sir.

Q. Do you know whether the "Kitsap" knew that you were racing or not?

A. I supposed they were. They tried to pass us. They were making all the speed they could to Bellingham.

Q. How do you know that?

(Testimony of Capt. Z. B. Murry.)

A. They had orders to beat the other boat.

Q. How do you know that? [213]

A. Well, I did not know it for a fact.

Q. And you say on the run to Edmonds you beat her four or five lengths? A. Yes, sir.

Q. That you got in four or five lengths ahead?

A. Yes, sir.

Q. You made it in the shortest course you possibly could? A. Yes, sir.

Q. How was the tide running?

A. I do not remember.

Q. What is the distance? A. 18 miles.

Q. What time of day was it?

A. Left here at 7:30, in the morning.

Q. The tide might have been ebbing?

A. I do not remember what it was doing.

Q. I say it might have been?

A. It might have been or might have been flooding.

Q. If it was ebbing it would help you on that run?

A. A little, not much.

Q. How does the tide run, about how fast, when it ebbs out of Elliott bay?

A. From here to Edmonds it might make a minute and a half difference in the running time.

Q. It would run about a mile or more an hour?

A. No, sir.

Q. Not around West Point?

A. It might at West Point.

Q. But it might run at least a mile an hour on that course? A. Yes, sir. [214]

Q. So that you may have had the assistance of the

(Testimony of Capt. Z. B. Murry.)

tide to the extent of at least a mile of the 19?

A. It is possible.

Q. And when you say that you mean nautical miles, you speak of nautical miles? A. Yes, sir.

Q. And when you spoke of running 19 you meant statute miles? A. Yes, sir.

Q. You did not know the condition of the "Kit-sap" at that time? A. No, sir.

Q. And you do not know what speed she had.

A. No, sir.

Q. You did not know anything about her.

A. No, sir.

Q. Now, you say that you think when the "Telegraph" was in condition she might have made at least 20 miles. You never run her 20 miles an hour?

A. No, sir.

Q. If she ever made 20 miles it would be when she had the tide or current helping her?

A. No, sir, I think she could make it in slack water.

Q. That is simply your opinion? A. Yes, sir.

Q. You never *an* her in slack water *that*?

A. No, sir.

Q. What time did you arrive at Edmonds on this trip?

A. I do not remember exactly the time we arrived there. You can put 56 minutes to the 7:34. [215]

Q. You left at 7:34?

A. We got on the course in about four or five minutes. That would make it about 8:30.

Q. Do you know whether or not you got there at 8:30? A. I am not positive.

(Testimony of Capt. Z. B. Murry.)

Q. How do you know it was 56 minutes.

A. Because I remember the time. It was the best time she made while I was in her.

Q. How long did you run on her?

A. Off and on from 1910 until the time she was sunk.

Q. Were you master of her at the time she sank?

A. No, sir.

Q. That was the best time possible for her to make that she made on that trip?

A. I do not think so.

Q. How many passengers did you have?

A. I do not know.

Q. Had she just been oiled before?

A. Yes, she was oiled up.

Q. Do not know what freight she had?

A. No freight.

Q. Do you know what draft she had forward?

A. No, I do not.

Q. Who have you talked with about this matter recently?     A. Nobody.

Q. Haven't you talked with Mr. Green?

A. He asked me about the best time that I made on the boat and I told him the same as I told you.

Q. But prior to that time you had not thought about this occurrence, had you? [216]

A. Oh, yes; at the time we made the run we talked of it on the boat.

Q. And since then, until you talked with Mr. Green the other day, you had not thought about it?

A. No, sir.

(Testimony of Capt. Z. B. Murry.)

Q. Then you remembered distinctly that it was 56 minutes? A. Yes, sir.

Q. Do you say that you thought at *that time* "Telegraph" was the fastest stern-wheel vessel ever constructed—or that it was thought at that time?

A. That is what she is reputed to be.

Q. By whom, who did you ever hear say that?

A. I saw her advertisements; she was advertised that way.

Q. The owners advertised her that way?

A. Yes, sir.

Q. You did not know whether it was true or not?

A. I never seen any other stern-wheeler pass her.

Q. You do not know what other stern-wheelers can do?

A. No, only what I have seen. I never heard of any faster.

Q. That is the only reputation she has, what her owners advertised her for, as far as you know?

A. The reputation she has made herself.

Q. Who else have you heard say that?

A. Well, she is supposed to be as fast as anything—

Q. Who did you ever hear say that?

A. The general public.

Q. The general public?

A. Yes, sir.

Q. Who are the general public?

A. That includes everybody that knows. [217]

Q. What other stern-wheelers are here?

A. Do you want me to name all of them?

(Testimony of Capt. Z. B. Murry.)

Q. Any other stern-wheelers that are running here. You say you never saw one pass her. Are there any other stern-wheelers that would run opposite to her?

A. There are lots of stern-wheelers, but none in her class.

Q. None running opposite to her, running with her, so that you would have a chance to pass them?

A. Yes, we have passed lots of them, all of them.

Q. What are they?

A. "Fairhaven," "Gleaner," and "State."

Q. What speed are they?

A. I do not know their speed.

Q. Fast boats?

A. No, they are not fast boats.

Q. You never run her on the Columbia?

A. No, sir.

Q. You do not know whether she could beat the "Spencer" or not?

A. I have heard lots of talk about it.

Q. You heard the "Spencer" had beat her?

A. No, sir.

Q. You never heard that?      A. No, sir.

Q. You do not know whether she could beat the "Bailey Gatzert" or not?

A. They said she beat everything down there. I was running to 'Frisco out of Portland; they said she beat everything there.

Q. And you do not know whether she beat the "Telephone"? [218]

A. She had to beat everything; if she beat every-

(Testimony of Capt. Z. B. Murry.)  
thing she beat the "Telephone."

Q. When was this you heard all this? A. 1906.

(Testimony of witness closed.) [219]

[**Testimony of W. H. Gates, for Libelant (in Rebuttal).]**

**W. H. GATES**, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your occupation, Mr. Gates? A. Marine Engineer.

Q. Were you ever engineer on the "Telegraph"?

A. Yes, sir.

Q. Chief? A. Chief engineer.

Q. At what times?

A. From, I think, it was about April, 1911, until about December of that year.

Q. Mr. Gates, what was the regular running time of the "Telegraph" between Seattle and Everett?

A. Her running time was about an hour and fifty-five minutes.

Q. How many miles? A. It was 33 miles.

Q. How much speed per hour would that be?

A. That would make about 17.

Q. How many turns of the wheel did she make in making that speed? A. Twenty-six.

Q. Did you ever turn her wheel faster than that?

A. I have got thirty-two out of her.

Q. You have turned her to thirty-two?

A. Yes, sir.

Q. Have you any way of saying what the speed of the boat would be at thirty-two?

A. Yes; you take the slip of the wheel and take

(Testimony of W. H. Gates.)

her time between Seattle and Everett. And then we say there is [220] about 16% allowed for that, and using that as a constant and taking the number of feet she will advance with the 32 turns, and you get the difference.

Q. According to your calculation what would she make with the thirty-two turns?

A. Average pretty near twenty miles, very close to it. I guess it would be twenty miles all right.

Q. Was she wide open when you made the 32 turns? A. Yes, we had the pass-over on.

Q. I forgot to ask you at the beginning how long you had held a chief engineer's license.

A. I have been a marine engineer for 22 years and have held my Chief's license since 1898.

Q. Do you know whether or not the "Telegraph" was reputed the fastest stern-wheeler in the world?

Mr. MERRITT.—I object as incompetent, irrelevant, immaterial and hearsay evidence.

A. That is what I always understood.

#### Cross-examination.

Q. (Mr. MERRITT.) You say you ran her wide open. How many pounds of steam did she take then? A. 160.

Q. How long would she carry that many making 32 turns running wide open?

A. We were alongside the "Kulshan" somewhere off West Point and I should judge we ran her that way about 10 minutes.

Q. That is as long as she would last. She would use the steam right up?

(Testimony of W. H. Gates.)

A. No, we did not; we held it right there. [221]

Q. When you ran her wide open she used steam very fast?

A. She used more oil for fuel, but she used steam, of course, but we could hold it there.

Q. You could hold it there?

A. At that time, yes, sir.

Q. But you used a large amount of oil?

A. Yes, lots of oil.

Q. You would not run her that way more than a few minutes at a time?

A. Could use it to pass another boat.

Q. So that that speed would not be practical speed to run her? A. No, not to run her right along.

Q. About 26 turns is about as many turns as you could make on a practical run?

A. No, she would make 28 with the cut-off, three-eighths cut-off, just jog along to make the time on the Everett run. When I took the ship from Leach here he told me Green said not to get in before half-past eleven. So I cut her off coming home and took it easy.

Mr. MERRITT.—I move to strike the answer as hearsay, incompetent, irrelevant and immaterial, and not responsive to any question.

Q. Now 28 turns is about all that is practical to make on her? A. Yes, economy to make.

Q. And you say that the time to Everett was 1:55?

A. Running time.

Q. From full speed to slow? A. Yes, sir.

[222]

Q. That was without any stops, was it?

(Testimony of W. H. Gates.)

A. That was full speed to slow. We would slow at Edmonds and then we would take the time again when we left and turned up full speed, to slow.

Q. That is you took the time out of the stops?

A. Yes, we called it from the time we got the slow bell.

Q. What would be the straight time from leaving the dock here?

A. As near as I remember, we were supposed to leave here at half-past seven; take about five minutes to get her on the course.

Q. When would you get in?

A. When would we arrive there?

Q. Yes, sir.

A. It would take us about an hour and three or four minutes running time, pretty near, to get to Edmonds.

Q. From there in what time would you run to Everett?

A. The average time landing at Everett was eight minutes in and out.

Q. What time did you get into Everett?

A. Get in there ordinarily at nine o'clock in the morning. About between nine five and nine eight. I don't remember exactly.

Q. When you left here at seven o'clock was it not the usual time to get in at 9:15?

A. It was earlier than that. We left at 9:15. She always made the time. We pulled out of there at 9:15. We laid there generally about ten minutes.

Q. In figuring the speed here as you have, you have

(Testimony of W. H. Gates.)

based it entirely on the slip of the wheel? [223]

A. Oh, yes.

Q. And the actual speed a vessel makes depends a whole lot on the load she has, her condition, etc.?

A. She would have no dead load except passengers; we never carried freight.

Q. It depends a good deal on the passengers and where they are on the boat?

A. Oh, yes, on a boat like her.

Q. So that you cannot figure accurately the speed of a vessel from the slip of her wheel running?

A. Oh, yes, you can.

Q. Without knowing where the load is placed?

A. You always take her mean draft into consideration. You have a certain slip you figure on the draft. With the "Telegraph" we did not have to figure that in the log. We did not pay any attention to that; we did not carry freight.

Q. Do you know what draft she had forward at this time?

A. I do not remember exactly. I think somewhere around six feet.

Q. Would she run best at six feet forward?

A. Yes, as far as you could get her by the bow she would run best.

Q. As a matter of fact, she could run best when she had about eight feet three draft forward?

A. I do not remember. I do not remember what the draft was forward.

Q. Now, you say that you have heard it said that she was the fastest stern-wheeler ever constructed?

(Testimony of W. H. Gates.)

A. Yes, sir. [224]

Q. All you know about it is what you heard some one say or some advertisement of the company. You are employed now by the Inland Navigation Company? A. Yes, sir.

Q. On the "Iroquoise"? A. Yes, sir.

Q. Engineer on that boat? A. Yes, sir.

Q. Who have you talked with recently about this matter?

A. I talked with Captain Parker not long ago—a couple of weeks ago.

Q. You talked with Mr. Green?

A. I talked with Mr. Green.

Q. Talked with Mr. Robinson, his attorney?

A. Yes, I spoke to him.

Q. They told you that they wanted to prove that the "Telegraph" was a twenty mile boat?

A. They told me that she was supposed to be the fastest boat. I don't think they asked me if I had heard that.

Q. They told you that they wanted to prove that in this case? A. I do not remember that.

Q. Told you that they wanted to prove that she was a twenty mile boat?

A. I don't think they did.

Q. How long ago did you have this conversation with them?

A. I guess about two or three days ago; maybe a week.

Q. Did you ever measure the distance between here and Everett?

(Testimony of W. H. Gates.)

A. I never measured it, no, sir. I have taken the captain's word for it. [225]

Q. As a matter of fact, it is not quite 33 miles?

A. I don't know exactly.

(Testimony of witness closed.) [226]

[**Testimony of H. Smith, for Libelant (in Rebuttal).]**

Mr. H. SMITH, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your occupation at the present time, Mr. Smith? A. Machinist.

Q. Where do you work?

A. Hutton Machine Works.

Q. Did you ever at any time during your life serve as a marine engineer? A. Yes, sir.

Q. For how long, Mr. Smith?

A. Right up to within six months ago.

Q. What license did you have?

A. I have ocean chief.

Q. Did you ever serve on the steamer "Telegraph"? A. Yes, sir.

Q. At what time?

A. When she was new, about 1903, I think she was built.

Q. How long did you serve on her?

A. Why, I put the machinery in her and ran as assistant engineer on her for a month after she came out.

Q. Were you on board the "Telegraph" shortly after she came out when she raced the "Flyer"?

A. Yes, sir.

(Testimony of H. Smith.)

Q. Where was that?

A. Between the bell-buoy and halfway up to Three Tree Point.

Q. Describe that race, just as you remember it. Were you on duty at the time?

A. Yes, I was running the boat at that time. We lay [227] around West Seattle and trimmed up for the race. They knew that we were going to race, they saw us there when they came in from Tacoma on that trip, and when she left here we circled around the buoy here, and from the bell-buoy we ran her until we threw nine or ten buckets out of her and had to stop.

Q. How was that wheel constructed as regards the buckets?

A. It was a fir wheel at that time, and it was a little light for the work, and so afterwards they put in oak and split the buckets.

Q. What was the result of that race, Mr. Smith?

A. Well, I judge that we beat the "Flyer" about half a mile very near that, we called it a half a mile at that time.

Q. You mean you were ahead of her when she began to break the buckets?

A. When we started the "Flyer" was in that position, off the engines, and when we stopped she was at least very nearly a half mile astern of us.

Q. Have you had anything in your possession since that has refreshed your memory as to that occasion?

A. No, I almost forgot it once in a while and then

(Testimony of H. Smith.)

I would meet Gil Parker that was on the boat at the time or Scot and talk it over. The last three or four years I haven't seen anybody to talk to about it.

Q. Do you remember how many turns you were making on that occasion?

A. Just before when everything was going all right, before the buckets broke we were making 32 revolutions. We were not doing our best then. We went out to break the record to Tacoma at that time, but the boat was not in [228] condition.

Q. And have you any means of knowing what speed you were making at that time?

A. Well, only judging from the turns that she was making and the distance we run and taking the slip of the wheel.

Q. What would that speed be?

Mr. MERRITT.—I object; the witness has not shown himself competent to testify.

A. Well, I should judge about 21 miles an hour. Between 20 and 21. That was with the old engines, not with the present engines in the boat.

Q. Mr. Smith, have you heard the "Telegraph" reputed to be the fastest stern-wheel steamer in the world?

Mr. MERRITT.—I object for the reasons stated to similar questions.

A. Always have.

#### Cross-examination.

Q. (Mr. MERRITT.) The "Telegraph," then, was in the very best of condition, was she not?

(Testimony of H. Smith.)

A. Yes, pretty good condition?

Q. She was fixed up for a race at that time?

A. Yes, sir.

Q. She had high-compress engines in her?

A. Yes, sir.

Q. And you could get more speed out of these engines than you could out of compound engines that she has got in her now?

A. Well, I don't know. I don't know very much about the engines she has in her now. [229]

Q. You can get more speed out of high-compress engines than out of compound engines?

A. Yes, sir.

Q. And especially with a stern-wheel vessel, where the compound engines are holding her stern down.

A. Well, they did not put her stern down because they got rid of her tanks; they got rid of the tanks and the extra weight of water.

Q. They are heavier engines?

A. That kind of lightened the boat up by taking out the extra water. They had long tanks for the high-pressure engines.

Q. These engines are a good deal heavier?

A. Yes, sir.

Q. And with the stern-wheel vessel, especially with the "Telegraph," the wheel had to be pretty well up out of the water to make her best speed?

A. Yes, sir.

Q. So that unless you compensated at the same time that extra weight of the compound engines, you certainly would not get as much speed out of her?

(Testimony of H. Smith.)

A. No.

Q. Would not get as much speed out of the compound engines as out of the high-pressure engines?

A. If they took the weight up and they naturally would; they would naturally take the weight up when they made her compound.

Q. I say a compound engine is slower and more economical than the high-pressure engine?

A. Yes, sir. [230]

Q. Now, at that time you do not know what condition the "Flyer" was in? A. No.

Q. You do not know whether the "Flyer" had got warmed up for the race at this time or not?

A. Well, I think the "Flyer"—

Q. I ask you what you know. You do not know whether she had or not.

A. I know they were looking for it for two or three days.

Q. They were looking for a race? A. Yes, sir.

Q. They were looking for a race to Tacoma?

A. Yes, sir.

Q. They were not looking for a race for a mile or two beyond Alki?

A. We started out for Tacoma.

Q. You started out for Tacoma, intending to race clear to Tacoma? A. Yes, sir.

Q. Sometimes vessels do as horses, the faster horse lets the slower get ahead, and then overtakes it?

A. Yes, sir.

Q. Now, with these thirty-two revolutions you were making you threw your wheel buckets?

(Testimony of H. Smith.)

A. Yes, sir.

Q. That was not a practical speed to run her at?

A. Why, she would stand that just as good as she would 26 if they had a wheel to stand it.

Q. If they had had a wheel to stand it?

A. That is what he was trying to find out. [231]

Q. He found out that he did not have?

A. Well, we had them afterwards.

Q. You only ran her a month so that you do not know whether after they put on the paddles they could run her at 32 or not?

A. I was there when they put them on.

Q. You never run 32 after that?

A. We used to run 26 and 28.

Q. You never measured her time over a known course, did you? A. No, sir.

Q. So that the only way you know is by an estimate? A. No—

Q. The only way you estimate the speed then is simply by the slip of the wheel?

A. Yes, and that is the proper way when you standardize her wheel.

Q. In your opinion at that time she could make between 20 and 21 miles, in the condition she was at the time of that race? A. Yes, sir.

Q. She had no passengers or freight?

A. No, sir.

Q. And the "Flyer" had her usual load, I suppose, for Tacoma?

A. Yes, sir, but they were all out of sight, all she had.

(Testimony of H. Smith.)

Q. Did you take the inside of the bell-buoy at that time? A. Yes, sir.

Q. The "Flyer" had to stay outside?

A. Yes, sir.

Q. Which side were you of the "Flyer" when you passed Alki [232] and after you passed Alki?

A. We were on the port side.

Q. Still on the port side.

A. The "Flyer" was on our starboard side.

Q. So you were always on the inside of the "Flyer"? A. Yes, sir.

Q. You had the shorter course? A. Yes, sir.

Redirect Examination.

Q. (Mr. ROBINSON.) Mr. Smith, do you know whether she has ever been run at 32 turns since the new buckets were put on?

A. No, not while I was there.

Q. Do you know whether she would stand it or not? Describe what changes were made then, if you were there when they were made.

A. Well, they constructed a wheel, put all oak in instead of fir, and broken buckets. They had had a straight bucket at that time, straight across the wheel, and he broke the buckets then. We never had occasion to run her that way; never got up against anything else.

Q. You put the machinery in this boat?

A. Yes, sir, the first machinery.

Q. Well, in your judgment, would that new wheel stand that many revolutions, 32?

A. Yes, and more, the new wheel.

(Testimony of H. Smith.)

Q. (Mr. MERRITT.) These new rims of oak were heavier than the old ones? [233]

A. No, sir, they were the same size.

Q. The oak was heavier than the fir, was it not?

A. Well, they were heavier.

Q. And they would weigh the stern down more?

A. Yes, sir.

Q. And to offset that they would have to weight her bow down? A. Yes, sir, sure.

(Testimony of witness closed.) [234]

[**Testimony of C. Lake, for Libelant (in Rebuttal).]**]

Mr. C. LAKE, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your business?

A. Marine engineer.

Q. What grade of license have you?

A. Chief of Lake, Bay and Sound steamers.

Q. How long have you held that license?

A. Chief's license about 14 years.

Q. Have you ever been engineer of the "Telegraph"? A. I was.

Q. Chief? A. Yes, sir.

Q. Chief engineer of the "Telegraph" at the time her present engines were put in? A. I was.

Q. That is at the time they were changed to compound engines? A. Yes, sir.

Q. Mr. Lake, did you ever determine what effect that had on the stern draft of the boat, the change of the engine? A. She laid six inches lighter.

Q. At the stern?

(Testimony of C. Lake.)

A. At the stern after the new engines were in her.

Q. You had been engineer on her for some time before that change was made?

A. Yes, sir, several months.

Q. And also for some time afterwards?

A. Some five months.

Q. What effect did the change of engines have on her speed?

A. I think the speed was about the same. I could not notice much difference in the speed. She maintained about the [235] same speed.

Q. How many revolutions would you ordinarily run her?

A. 27 or 28. Probably sometimes 26, depending on the tide and time we had.

Q. What is the most you ever run her?

A. Thirty-four.

Q. You say that her stern was raised six inches. How do you account for that?

A. Taking the water-tanks out of her. They held thirty tons of water. Then the weight of the tanks was considerable. She had four big tanks, cylindrical tanks, and the weight of them was considerable and then the thirty tons of water that they held.

Q. What is the fastest you ever ran the "Telegraph"?

A. Well, we raced the "Flyer" from Alki Point one evening we came from Bremerton and she came from Tacoma, and we got side by side, that is we got a little astern of her, stayed right in her swell, we could not climb out, but she could not shake us. We

(Testimony of C. Lake.)

were making 34 turns out of her and it can be figured out accurately.

Q. Have you figured it out? A. No, I have not.

Q. Have you an opinion as to how fast she was going at that time?

Mr. MERRITT.—I object; the witness has not shown himself to be competent to express an opinion as to that.

A. Well, I don't know; it ought to be somewhere around 20 or 21 miles at that rate.

Q. How long were you on the "Telegraph" altogether?

A. I was on her five months with the new engines. And I was [236] in her in the old engines nine months going to Bremerton and we overhauled her previous to that. I was on her 15 or 16 months.

Q. Have you ever heard anything about the reputation of the "Telegraph" as compared with other stern-wheel boats?

Mr. MERRITT.—I renew the former objection made to this line of testimony.

A. I have heard people that had an opinion that she was that.

Q. That she was what?

A. The fastest boat. She was advertised for that. I think she was one of the fastest stern-wheel boats on this coast.

Q. Do you know what her ordinary time was to Bremerton when you were running over there?

A. 48 to 49 minutes average, running over.

Q. How many miles was that?

(Testimony of C. Lake.)

A. I think they called it 16. I asked the captain what the distance was, and he said 16 miles, if I remember right.

Q. Is that the best time you ever made over there?

A. We could have made it faster. That was the ordinary 27 or 28 turns.

Q. With the cut-off?

A. Yes, sir; 3/8th stroke with the old engine.

Q. What is the fastest time you ever made with "Telegraph" between here and Bremerton?

A. Well, the fastest time I think was 48 minutes, but we never crowded her going over there. [237]

#### Cross-examination.

Q. (Mr. MERRITT.) When did you make that time, 48 minutes from here to Bremerton?

A. We done it several times; 48 or 49 is what we figured on.

Q. What you figured on what you made is a different matter. When did you make it?

A. The time the big fleet was there.

Q. What time of the day?

A. Oh, we made five trips a day.

Q. Which of these trips did you make it on?

A. One time I remember leaving at 9 o'clock in the morning.

Q. When did you get into Bremerton?

A. We got in there before ten.

Q. Got in before ten? A. Yes, sir.

Q. How much before ten?

A. Well, 12 or 13 minutes.

Q. You are ready to swear that you got in there

(Testimony of C. Lake.)

13 minutes before ten?    A. Yes, sir.

Q. What time did you leave Seattle?

A. Nine o'clock.

Q. Exactly?    A. Yes, sir.

Q. So that would make it 47 minutes?

A. 47, 48 or 49.

Q. Why did not you say you made it in forty-seven minutes when your counsel asked you?

A. I stated 12 or 13 minutes.

Q. You state that you will swear that it was 13 minutes? [238]    A. Twelve or thirteen.

Q. Are you willing to say it was 13?

A. 12 or 13.

Q. Are you ready to swear that it was 12 minutes before ten that you got to Bremerton?

A. Yes, sir.

Q. It was nine o'clock exactly when you left here?

A. Yes, sir.

Q. How was the tide running?

A. I don't know nothing about the tide. I did not pay attention to the tide in the engine-room.

Q. What date was that?

A. We ran over there nine months.

Q. What day did you make this particular time that you have testified about?

A. I could not give the date.

Q. Did you make it every day?

A. Yes, every day; that is we averaged that.

Q. Are you talking about an average now or are you swearing to any particular time you got in there, twelve minutes of ten, when you left exactly at nine?

(Testimony of C. Lake.)

A. No, I could not do that; we figured on that as the regular run.

Q. You do not know of any particular time when you ever did it? A. No, I do not.

Q. You are simply testifying now as to what you figured on and not what you remember having done?

A. I did not pay attention to dates.

Q. I say then that you are testifying, and have testified [239] simply as to what you figured on, and not as to any recollection of any particular time that you made that time?

A. No, I could not name any date.

Q. You could not swear of your own knowledge, of your own recollection that you ever left exactly at nine o'clock and got in 12 minutes before ten, could you?

A. I could not name the date but I know we did it.

Q. You could not tell about the condition of the tide at any of these times? A. No.

Q. It was more often 56 minutes or 58 minutes that it took you to make that run.

A. Probably was, but we used to stop at Pleasant Beach sometimes.

Q. Sometimes when you did not stop at Pleasant Beach it was that?

A. No. Never took that long unless we stopped at Pleasant Beach.

Q. Now, then, when you were running against the tide it took longer? A. No.

Q. You know that the tide along through the channel there runs three or four miles an hour?

(Testimony of C. Lake.)

A. Probably for a certain distance.

Q. A distance of two or three miles at least?

A. In the Narrows.

Q. All the way from the lower end of Bainbridge Island up until you get by Point White, anyhow?

A. You allow for the tide in figuring your speed.

Q. I did not say anything about your figuring the speed, but [240] you have a strong tide from Pleasant Beach clear up until you pass Point White, haven't you?    A. Yes, sir.

Q. That is a distance of about three miles, is it not?    A. Yes, probably.

Q. That tide keeps setting there, to and from Bremerton, don't it, right through that channel?

A. Yes, sir.

Q. And out in the Sound it sets very strong from Alki Point right straight across to Pleasant Beach, or the other way, one way or the other?

A. I do not know anything about that.

Q. You do not know how it does?    A. No.

Q. And these times you could not tell how the tide was running?

A. It is not always against you, it is with you sometimes.

Q. Do you keep the time in the engine-room?

A. Yes, sir.

Q. Have you got it?    A. No, sir.

Q. Have you seen it?    A. No, sir.

Q. How long since you did see it?

A. Since I left the boat.

Q. When did you leave the boat?

(Testimony of C. Lake.)

A. It was in the fall of 1909 I went off that boat.

Q. That was before these new engines were put in?

A. That was after the new engines were put in.

Q. They were put in in 1909? [241]

A. Yes, in the spring.

Q. You ran her sometime after that?

A. Five months.

Q. Was that before Mr. Green bought the boat?

A. Yes, sir.

Q. She was not running on the Bremerton run then? A. Not with the new engines, no.

Q. She never run on the Bremerton run with the new engines? A. No.

Q. Now, you say these new engines raised her stern six inches? A. Yes, sir.

Q. That is six inches over what she would have drawn with her tanks full of water or empty?

A. With them full.

Q. If they were full? A. Yes, sir.

Q. And raised more than that when they were empty. How much more?

A. I do not know. We marked on the transom before we started to take anything out of her; then we noticed how high she got up after the new engines were put in.

Q. Her tanks were not full all the time?

A. Oh, no.

Q. Sometimes they were full and sometimes they were away down?

A. She would use it, of course.

(Testimony of C. Lake.)

Q. Her draft would continually change while you were using the water?    A. Yes, sir.

Q. You say the fastest you ran her was when you had a race from the bell buoy with the "Flyer"?  
[242]    A. Yes, sir.

Q. You could not get past the "Flyer"?

A. No, sir.

Q. Did you start the race at the bell buoy?

A. No, beyond the bell buoy, opposite Alki Point.

Q. How far did you race?    A. Into Seattle.

Q. Clear in?    A. Yes, sir.

Q. How far from the docks before you stopped?

A. When they blew the whistle we slowed down before the "Flyer" did.

Q. You estimate that you were running 20 to 21 miles an hour?    A. Somewhere around there.

Q. How do you estimate it?

A. By the revolutions.

Q. That is the only way you can tell?

A. That is the only way the speed is figured.

Q. Do you know how many passengers you had at that time?    A. I do not.

Q. Do you know where the passengers were on the boat?

A. I suppose scattered over the cabin, all over the boat.

Q. You do not know anything about it?

A. No, I was not up there.

Q. Don't you know as a matter of fact you had to have the passengers on the bow to hold her stern up to make the best speed?

(Testimony of C. Lake.)

A. We had her trimmed; the passengers on the bow would help her some.

Q. You mean to say that you ran at that speed into this [243] harbor, until you reached the point where you ordinarily blow for the docks?

A. Just previous to blowing the whistle we slowed down.

Q. You know there is an ordinance of this city against running into this harbor at a greater speed than six miles an hour?

A. I don't know; I guess there is.

Q. You mean to say that you violated that ordinance? A. I do not.

Q. You do not? A. No.

Q. You did not have anything to do with it?

A. The captain—

Q. You did not have anything to do with violating the ordinance, did you? A. I don't think so.

Q. You were not running the engines?

A. Yes, sir.

Q. You were told to get the best speed that you could out of her? A. Yes, sir.

Q. And you did it? A. I did.

Q. You kept it up until the whistle was blown for the docks at Seattle?

A. The captain did that; the captain slowed down.

Q. You knew that you were within a very short distance, a few hundred feet of the docks when you slowed down?

A. I knew we were getting pretty close.

Q. You knew you were violating that ordinance

(Testimony of C. Lake.)

when you did [244] that? A. Probably I did.

Q. What date was this?

A. I could not tell you; I do not remember.

Q. Now, I want to know somewhere near when it was. A. I could not tell you.

Q. What year was it? A. It was 1910.

Q. What month?

A. It was some time in the summer.

Q. Was it May or June or July?

A. I could not tell you.

Q. You could not say whether it was May, June or July? A. No.

Q. Or August? A. I do not remember.

Q. Where were you during this race?

A. In the engine-room.

Q. Did you go out of the engine-room?

A. No, sir.

Q. Stayed in the engine-room all the time?

A. Yes, sir.

Q. Do you know what the "Flyer" was doing, whether she was making her best time?

A. I know she was running pretty hard; she was burning lots of fuel at the same time.

Q. You were burning lots of fuel? A. Yes, sir.

Q. You could not tell how the "Flyer" was turning, as you were not out of the engine-room? [245]

A. The engine-room was on the main deck and you could look out of the door.

Q. You could see the "Flyer"? A. Yes, sir.

Q. See out ahead through the "Telegraph" and see the "Flyer" ahead?

(Testimony of C. Lake.)

A. No, I could see out of the door.

Q. You looked out of the door? A. Yes, sir.

Q. Then it was not true, as you stated, that you never left the engine?

A. The door is right in the engine-room.

Q. You had to leave the engine? A. I did not.

Q. Stood right there at the throttle all the time?

A. No, I did not stay at the throttle all the time, but I was in the engine-room.

Q. You were close to the engine all the time?

A. Yes, sir.

Q. You were over at the door part of the time?

A. The door by the engine.

Q. You did not get by the "Flyer," did you?

A. No, sir.

Q. Do not know how many passengers the "Flyer" had? A. I do not.

Q. Do not know what steam she had? A. No.

Q. Don't know anything about her condition?

A. No, sir.

Q. Simply know that you came right up at her stern and [246] stayed there?

A. Yes, sir; we could not get clear from the swell.

Q. You could not get outside of it? A. No.

Q. That was from this side of Alki in to the docks, about three or four miles?

A. Somewheres around there.

Q. You never run the "Telegraph" over a measured course? A. Never did.

Q. After the compound engines were put in, you say her speed was about the same. As a matter of

(Testimony of C. Lake.)

fact, they never could get as much speed out of her with the compound engines as with the old engines?

A. Well, I think there was not much difference.

Q. There was some?

A. Probably shaved it a very little.

Q. A shade slower?

A. She could be trimmed. All you had to do was to trim her down by the head and she would run.

Q. You had to have her down about 8 feet three to *her, her*, didn't you?

A. I never knew how deep she was down by the stem. I kept track of the stern.

Q. You are employed by the Inland Navigation Company? A. Yes, sir.

Q. And have been for some time.

A. Yes, sir, several months.

Q. Chief engineer of the "City of Everett"?

A. I am.

Q. The "City of Everett" is now operated on the Everett-Seattle [247] run? A. Yes, sir.

Q. And has been running there for some time?

A. A couple of months; something like that.

Q. And since the "Telegraph" was lost the "Everett" has been running on this Seattle-Everett run most of the time, has she not?

A. I don't know. I started in for the company in August.

Q. Who did you talk with about this matter before coming up here?

A. Fred Gates. I talked it over the other day for a few minutes.

(Testimony of C. Lake.)

Q. Did Mr. Green talk with you? A. No, sir.

Q. Have not you talked with him at all?

A. No, sir.

Q. Talk with Mr. Robinson, the attorney?

A. I did.

Q. Who else did you talk with?

A. Mr. Bishop was down, that was all. Wanted to know if I recollect anything of the "Telegraph."

Q. Mr. Bishop was one of the officers of the Inland Navigation Company? A. Port Engineer.

Q. He told you what they wanted to prove?

A. He did not. He asked me my opinion as to the speed, and said probably they would want me as a witness.

Q. Told you he wanted to prove she was a 20-mile boat, did he? A. I do not think he did. [248]

Q. Well, he told you that was the question, that they wanted to establish, that she was a twenty-mile boat, something to that effect?

A. No, he asked me how fast I thought the boat was.

Q. That is the first thing he said to you?

A. Yes, talked in regard to the "Telegraph."

Q. You told him she was a 17 or 18-mile boat?

A. I did not.

Q. What did you tell him?

A. I told him she was 20 or 21 miles, that she could make that in good condition.

Q. When she was new and in the best condition?

A. A boat ought to be in good order all the time.

(Testimony of C. Lake.)

Q. That is what you meant when you said when she was in good condition, didn't you?

A. I did not. They would not let a boat run down.

Q. You have heard talk before about this case?

A. Mr. Bishop said he probably would call me as a witness.

Q. And that he wanted to prove that she was a twenty-mile boat?    A. He did not say that.

Q. He wanted to prove that she was a very fast boat?

A. No, he did not say that, did not say anything about proving anything.

Q. Well, did he say he wanted some evidence that she was a very fast boat, anything to that effect?

A. Wanted me to testify to the speed I thought she had.

Q. Wanted you to testify that she could make 20 miles an hour?

A. Testify to her speed, in my opinion.

Q. I say, he wanted you to testify that she would make twenty [249] miles an hour?

A. He did not.

Q. He did not say anything of that kind?

A. Nothing of that kind.

Q. When you talked with him did you mention anything about her speed of twenty miles?

A. I did. I said I thought she would make 20 or 21 miles; that she could make that. He asked my opinion in regard to that.

Q. That was when she was in condition.

A. When she was in good condition.

(Testimony of C. Lake.)

Q. Trimmed and everything ready for it?

A. Trimmed for it. If she was trimmed down by the head; if she was not trimmed down by the head she could not run very fast; she had to be trimmed by the head.

Q. And one way they trimmed her was by having the oil tanks full? A. Certainly.

Q. And of course you used the fuel out of the tanks? A. Yes, sir.

Q. And another way they would fetch the passengers on the forward deck?

A. Yes, sir. They used to carry ballast in her stem, too.

Q. You had to carry a whole lot of ballast?

A. We had a lot of scrap iron on the stem.

Q. And they put in a lot more after the new engines were put in? A. There was some put in.

(Testimony of witness closed.) [250]

[**Testimony of George Leach, for Libelant (in Rebuttal).]**

GEORGE LEACH, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your business?

A. Marine engineer.

Q. What license have you?

A. Two thousand tons.

Q. How long have you had it?

A. About 12 years.

Q. Were you ever an engineer on the "Telegraph"? A. I was.

Q. Were you in charge of the "Telegraph's" engines at the time when she raced the "Kitsap"

(Testimony of George Leach.)

from Seattle to Edmonds?    A. Yes, sir.

Q. How many turns were you making at that time?    A. About 32 turns.

Q. Do you know what time you made on that occasion?

A. About 56 minutes from the Seattle dock to Edmonds.

Q. Do you know whether or not you beat the "Kitsap" on that occasion?    A. We beat her that day.

Cross-examination.

Q. (Mr. MERRITT.) Who are you employed by?

A. By the Washington Route Steamship Company, steamer "Mohawk."

Q. You say you beat the "Kitsap" that day?

A. Yes, sir.

Q. What days did the "Kitsap" beat you?

A. She never beat us.

Q. While you were running? [251]    A. No.

Q. How long were you on her?

A. I believe about nine months, all told.

Q. You do not know whether she ever beat her any time when you were not on her?

A. I could not say.

Q. You say it was about 56 minutes. How near 56 minutes was it?

A. Well, I think, as a matter of fact, it was a little under 56 minutes. We called it 56 minutes, but it was a shade under 56.

Q. Might have been a little bit more?

A. Nothing doing. It was not over, I am positive.

Q. You do not know how the tide was?

(Testimony of George Leach.)

A. We do not keep much track of the tide.

Q. I ask you what you know about it. You had a good tide on that morning, of course? A. We had.

Q. And that tide runs out of Elliott Bay sometimes over a mile an hour?

A. This morning, I believe, the tide, we were bucking a little tide; it was pretty near dead water.

Q. When you started? A. Yes, sir.

Q. Then when you got around West Point you would have a favorable tide?

A. No, I do not think it; I could not say.

Q. If it was dead water when you left Seattle, you certainly would have a favorable tide when you got around West Point.

A. Not in that length of time, for it was not quite dead [252] water.

Q. Do you know anything about it?

A. I do not know positively; I could not say.

Q. What date was this?

A. I am not positive as to the date.

Q. What time of day was it?

A. It was between seven and eight o'clock, in the morning.

Q. What month?

A. The month of May, I think. I am not positive.

Q. You are not sure about that. In May you have some high tides?

A. I do not know much about the tides.

Q. Of course, the tide does set pretty strong up along the coast from West Point until you get up to Edmonds, one way or the other?

(Testimony of George Leach.)

A. I never paid much attention to the tide.

Q. Of course, this time was from dock to dock, or starting where you run full speed until you stopped, slowed down?

A. What we call jingle to jingle.

Q. From full speed until you slowed down. You got the jingle after you got on your course here at Seattle?    A. Yes, sir.

Q. Then you slowed down, what you call the other jingle is several hundred feet from the dock at Edmonds, to slow down?    A. Yes, sir.

Q. That was the 56 minutes, that time from jingle to jingle?

A. From dock to dock 56 minutes. We left the dock, backed out of here from the dock, from the time we backed out here until we stopped at the dock at Edmonds, was 56 [253] minutes.

Q. You said from jingle to jingle was 56 minutes?

A. I suppose that is the way you figure it.

Q. That is what you meant? And you beat the "Kitsap" three or four lengths?

A. Yes, sir, all of that.

Q. Which side of the "Kitsap" were you on on that run?

A. On the outside; she was on the inside of us, I believe.

Q. She was on the inside of you all the way?

A. Yes, she was on the inside all the way.

Q. The course runs out to West Point and then turns and goes pretty straight to Edmonds?

A. Yes, sir.

(Testimony of witness closed.) [254]

[**Testimony of W. C. Roach, for Libelant (in Rebuttal).]**

W. C. ROACH, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your business?

A. Marine engineer.

Q. What grade of license have you?

A. Chief,—lake, bay and sound.

Q. How long have you had such license?

A. Chief's license about two years.

Q. Were you ever engineer on the "Telegraph"?

A. Yes, sir.

Q. Assistant or chief, what grade?

A. First assistant.

Q. At what time?

A. Well, I was on her two different times. I was on her the first time the second season she was built; and then I was on her when she was on the Bremer-ton run, and also when she was compounded.

Q. You were on her when she was compounded?

A. Yes, sir.

Q. Do you know what effect the putting of the compound engines in had on her draft at the stern?

A. Well, it raised her up between five and six inches.

Q. How do you know that?

A. By measurements. We measured her before we took the water tanks out of her and after we got the engines in her.

Q. Mr. Roach, have you ever heard what the reputation of the "Telegraph" was as to speed?

Mr. MERRITT.—I object for the reasons hereto-

(Testimony of W. C. Roach.)

fore stated as to this line of examination. [255]

A. Yes, sir, I have heard she was the fastest stern-wheeler in the world.

Q. You were on her three different times, you say? You were on her before and after her engines were compounded?

A. Yes, sir, I was on her at the time.

Q. Did that make any difference in her speed, if you know?

A. Well, very little, if anything. We make the same speed with the new engines with less turns than with the old ones.

Q. Could the "Telegraph" make 20 miles an hour? Mr. MERRITT.—I object as leading.

Q. I will change the question. How many miles an hour could she make at her maximum speed?

A. Well, I don't know. I never ran her wide open myself when I was on her, but I always thought she could make 20 miles.

Mr. MERRITT.—I move to strike the answer as a conclusion and as incompetent, irrelevant and immaterial, and not responsive to the question.

#### Cross-examination.

Q. (Mr. MERRITT.) You say the compound engines raised her stern? A. Yes, sir.

Q. As a matter of fact, you put ballast in the bow, didn't you?

A. Well, we did not put in very much.

Q. You put in some?

A. Yes, we put in some.

Q. You put in some and you raised her stern by

(Testimony of W. C. Roach.)

putting [256] in ballast in the bow?

A. Well, of course, you put ballast in the bow you would raise the stern.

Q. That was the purpose of doing it?

A. It was, to a certain extent.

Q. It was to overcome the additional weight of the compound engines, was it not?

A. She was lighter without the ballast by the stern than she was with the old engines.

Q. The purpose of putting the ballast in the bow was to raise the stern? A. Yes, sir.

Q. That is what they did it for, to overcome the additional weight of the compound engines?

A. Of course, the ballast, you put a weight in the bow and it will raise the stern.

Q. You know what kind of a stern she had?

A. Yes, sir.

Q. Beveled transom, was it not? A. Yes.

Q. And you know that about 18 inches of the transom had been cut-off while she was in Portland?

A. I heard say they had.

Q. And about eight inches had been cut off before she went down to Portland?

A. I don't know anything about that.

Q. You know, as a matter of fact, some of it had been cut off? A. Yes, sir.

Q. And what would be the effect of that on her speed?

A. I don't know that that would help her any.

[257]

Q. It would tend to drag the water, would it not?

(Testimony of W. C. Roach.)

A. I could not say about that.

Q. It certainly would not give additional speed to take off 18 inches?

A. I don't know anything about that part of it.

Q. When she was first constructed she had a ram bow, didn't she?

A. Well, kind of a battleship bow.

Q. And while she was in Portland about 18 inches of that bow was cut off?

A. I don't know anything about that.

Q. And after that 18 inches was cut off her bow, that would tend to slow her, would it not?

A. I don't know anything about that.

Q. It would tend to push the water, raise the bow and lower the stern, and slow her down?

A. I don't know anything about that part of the business at all.

Q. You think the compounding of the engines did not make much difference? It did make some difference?

A. I know you could get the same time with less turns out of her.

Q. You could get her ordinary time with less turns, that is all you mean?

A. That is all. You do not have to turn up the engines as fast to get the same time out of her as before.

Q. And not quite as much fuel?

A. More economical.

Q. Now, this reputation that you have heard of. You have heard of people connected with the Inland

(Testimony of W. C. Roach.)

Navigation [258] Company talking about her being fast?

A. No, I never heard anything from them people.

Q. You have seen advertisements of it?

A. I know when she was first built that that was the reputation she had.

Q. That is the reputation that Mr. Scott claimed for her?

A. I know she skinned all the boats around here. That ought to be a pretty good reputation.

Q. What boats did she skin?

A. I saw her skin the "Flyer."

Q. When did you see her skin the "Flyer"?

A. One Fourth of July.

Q. That was a race across the Sound?

A. Yes, sir.

Q. That is the only time you saw her skin her?

A. That was one time, that was the record.

Q. You do not know what condition the "Flyer" was in? A. No, I do not.

Q. As a matter of fact, she did not get a length ahead of the "Flyer" in crossing the Sound?

A. We ran along side by side.

Q. You ran along side by side clear across?

A. Until she headed off for Tacoma and we went to Bremerton. She followed us and tried to get ahead of us but could not do it.

Q. But she held her own with you, didn't she?

A. She did for part of the time.

Q. She held her own until she turned off to the West Passage to Tacoma?

(Testimony of W. C. Roach.)

A. I don't know what channel she took to Tacoma.

[259]

Q. It was over to the south of Pleasant Beach that she turned off?    A. Somewhere there.

Q. At the lower end of Bainbridge Island?

A. Yes, sir.

Q. And you went on your run to Bremerton?

A. Yes, sir.

Q. You do not know anything about the condition of the "Flyer"?

A. I do not know anything about it.

Q. But you do know that you run the "Telegraph" the best you could?

A. She would not have been so far off her course if she had not been trying to get ahead of us.

Q. You were running the "Telegraph" the best you could?    A. No, we were not.

Q. You were not?    A. No.

Q. You did not care to get away from the "Flyer"?

A. We did not want to let her pass us, certainly not, but we had a little to go on in the "Flyer" had been gaining on us.

Q. Not a great deal?    A. Well, we had some.

Q. That was the old engines that you had at that time?    A. Yes, sir, that was the old engines.

Redirect Examination.

Q. (Mr. ROBINSON.) What was it brought the stern of the boat up, as you have testified, at the time you compounded the engines? [260]

(Testimony of W. C. Roach.)

A. By taking the water-tanks out of her and the water.

(Testimony of witness closed.) [261]

[**Testimony of Capt. H. H. McDonald, for Libelant  
(in Rebuttal).]**

Capt. H. H. McDONALD, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q. (Mr. ROBINSON.) What is your business?

A. Master mariner.

Q. Did you ever serve on the "Kitsap"?

A. I did not.

Q. I mean the "Telegraph." A. Yes, sir.

Q. Were you mate of the "Telegraph" when Captain Murry was master of her? A. Yes, sir.

Q. Were you mate of the "Telegraph" at the time she had her race with the "Kitsap" from here to Edmonds? A. Yes, sir.

Q. What made you think that you were having a race?

A. I saw the "Kitsap" alongside, blowing off all the time.

Q. Do you know what time they made on that occasion? A. 56 minutes.

Q. Did you ever have any other race with the "Kitsap"?

A. Yes, I did. I had one out here, between here and Smith's Cove. She was going to oil. We left at noon, and she ran alongside of us, and I whistled down and told the chief who was alongside, and he

(Testimony of Capt. H. H. McDonald.)

dropped her down and we held her until she turned off.

Q. Did you beat her this time that you went to Edmonds? A. Yes, sir.

Q. How much?

A. I should judge three or four lengths of her.

Q. How long have you been going to sea on Puget Sound?

A. I have been on the Sound pretty near all my life. [262]

Q. About how long would that be?

A. I have been steam-boating about 16 years.

Q. Do you know anything about the general reputation of the "Telegraph" for speed?

A. I do.

Mr. MERRITT.—I make the same objection to this line of testimony as heretofore made.

Q. What do you know about it?

A. She is supposed to be the fastest stern-wheeler around the coast.

Mr. MERRITT.—I move to strike the answer as a conclusion and as not responsive to the question.

#### Cross-examination.

Q. (Mr. MERRITT.) This race from Seattle to Edmonds was from jingle to jingle, when you made it in the 56 minutes? A. Yes, sir.

Q. You got the jingle when she was turned around so that you can get full speed on her?

A. On her course, yes.

Q. And the other jingle is when you slow down for the docks at Edmonds? A. Yes, sir.

(Testimony of Capt. H. H. McDonald.)

Q. This reputation that you have heard about is just the advertisements you have seen here on the Sound?

A. Yes, and I have heard different parties talk of it. Used to be a kind of by-word in passing her with certain steamers, to say there goes the fastest stern-wheeler.

Q. How long ago was that?

A. Oh, that has been mostly since she was built.

[263]

Q. Did you see her in Portland?

A. No, I did not.

Q. Don't know what she did down there?

A. No, sir.

Q. Don't know whether any boats beat her down there or not? A. No.

Q. Or what reputation she had down there?

A. No.

Q. Are there any fast stern-wheelers on the Sound?

A. There is only one, the old "Greyhound," she is supposed to be pretty fast.

Q. She is not in the class of the "Telegraph"?

A. No.

Q. How is the "Kitsap," is she supposed to be one of the fast boats?

A. She is supposed to be one of the fastest on the Sound.

Q. You do not know what her maximum speed is?

A. No.

Q. Don't know what her condition was at the time of this race? A. No, sir.

(Testimony of Capt. H. H. McDonald.)

Q. Or what steam she was carrying?

A. No, sir.

Q. Do you know what steam the "Telegraph" was carrying at this time? A. No, sir.

Q. Did you keep the time?

A. I did. I was steering the boat at the time we left here in the fog. It was kind of foggy, and that boat is hard to steer. Very few men can steer her, on the Sound. [264] She is apt to travel three miles out of every twenty winding around the Sound trying to steer her.

Q. She did not steer very well?

A. No, sir. The hardest thing I ever got hold of to steer.

Q. That is on account of the ram-bow?

A. Oh, no.

Q. What is it?

A. I don't know what it is. She had only one rudder.

Q. That is a very large rudder, is it not?

A. No, not overly large.

Q. What is it that makes her so hard to steer?

A. I don't know of anything; she is hard to steer.

Q. When she was originally built she had a ram-bow?

A. I did not know anything about her at that time.

Q. What time did you leave the dock at Seattle on this race? A. We left the dock at 7:30.

Q. What time did you get into Edmonds?

A. I could not say. I was not in the wheel-house when we got there. When we passed Point Ed-

(Testimony of Capt. H. H. McDonald.)  
monds the captain took the wheel.

Q. So you do not know what the time was that was put down? A. No, I took the time at Ten Mile.

Q. You mean ten miles this side?

A. Ten Mile Point, about three minutes into Edmonds.

Q. But you did not take any time after that?

A. No. Slowed down.

Q. What do they call that Ten Mile?

A. Ten Mile Point.

Q. What makes that name?

A. Ten miles from Nuckilteo. [265]

Q. How far from Edmonds?

A. I don't know, a mile and a half.

Q. Do you know how the tide was at that time?

A. I don't know.

Q. You get a fairly strong tide up on that run, don't you?

A. According to the kind of tide, what kind of run you have got.

Q. The tide runs pretty strong there, at times?

A. Oh, yes, at times.

Q. Sometimes you will get a strong tide all the way down from West Point up there practically?

A. Sometimes.

Q. You do not know how it was at this time?

A. No.

Q. That tide will run sometimes a couple of miles an hour or stronger up there?

A. Yes, in certain places.

(Testimony of witness closed.)

Testimony closed. [266]

**[Certificate of U. S. Commissioner to Testimony,  
etc.]**

United States of America,  
Western District of Washington,  
Northern Division,—ss.

I, A. C. Bowman, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle in said District, do hereby certify that

The foregoing transcript, from page 1 to page 255, both inclusive, contains all of the testimony offered before me by the parties under the order of reference herein.

The several witnesses, before examination, were duly sworn to testify the truth, the whole truth and nothing but the truth.

Proctors for the parties stipulated waiving the reading and signing of the testimony by the witnesses, agreeing that the same should have the same force and effect as if so read and signed by them.

The exhibits offered by the parties are returned herewith, as shown in the record and index.

I further certify that I am not of counsel nor in any way interested in the result of this suit.

Witness my hand and official seal this 28th day of January, A. D. 1913.

[Seal]

A. C. BOWMAN,  
U. S. Commissioner. [267]

## COMMISSIONER'S TAXABLE COSTS.

## Libelant's:

Hearings August 8, 12, 14, 1912 Jan.

27, 1913 .....	\$12.00
Administering oaths to 14 witnesses..	1.40
Marking and filing 2 exhibits.....	.20 Paid
Transcript libelant's testimony 491 folios .....	49.10
	_____
	\$62.70

## Claimant's:

Hearings January 18, 23, 1913.....	6.00
Administering oaths to 7 witnesses...	.70
Marking and filing 6 exhibits.....	.60 Paid
Transcript above hearings, 208 folios at 10¢.....	20.80
	_____
	\$28.10

[Indorsed]: Testimony Reported by Commis-  
sioner. Filed in the U. S. District Court, Western  
Dist. of Washington. Feb. 10, 1913. Frank L.  
Crosby, Clerk. By E. M. L., Deputy. [268]

[Claimant's Exhibit No. 1—Proposal, Dated July 12, 1912, Joseph Supple to Inland Navigation Co.]

Phone East 421

Office and Yard Foot Belmont St.

Most Central Yard in the City.

**JOSEPH SUPPLE.**

**SHIP YARD AND MARINE WAYS.**

Portland, Oregon, July 12, 1912.

Inland Navigation Company,

Seattle, Washington.

Gentlemen:—

Having been asked by you to submit a proposal for duplicating the steamer "Telegraph," I wish to state that I am well acquainted with the design and construction of this steamer, reputed to have been the fastest stern-wheel afloat, and that I am willing to duplicate her, with all her machinery equipment, furnishings, outfit and stores for the sum of Seventy-two Thousand Five Hundred Dollars (\$72,500.00) F. O. B. Portland.

In this proposal I figure on a hull 153.7 ft. in length; 25.7 beam on hold and 8 ft. molded depth. The construction of hull to be as follows:

Frames to be molded from double 4 inch flitch of selected yellow fir, fastened together with galvanized bolts. Stem and stern frame to be white oak, all longitudinal members of construction such as, keel, keelsons, clamps, stringers, shear strakes, etc., to be of straight grain yellow fir in as long lengths as can be procured, and with all scarf's to be in length not less than four times the width of pieces, and strongly

bolted. The hull to be strengthened longitudinally by 5 rows of Howe trusses, two each side, and one at center, with rod at each panel and iron caps on braces, trusses distributed as on steamer "Telegraph."

Deck beam to be sprung to place, overhanging hull to form fender; Outside planking and deck planking to be of selected edge-grain yellow fir, in length of not less than 40 ft. with butts properly shifted, and seams and butts well caulked and filled. Vessel to be properly and strongly chained up on hog posts, the same as on vessel referred to. Steering apparatus to consist in main and monkey rudders, a Turner, or equal, steam and hydraulic steering gear, in combination with the hand steering gear in pilot house.

Upper work to include a complete enclosed main deck cabin, containing a lamp room at bow, baggage room, toilet and wash room; passenger cabin each side of boiler room, furnished for about 100 passengers; dining room, having 6 tables and 24 chairs, with sideboard, racks and lockers; galley and pantry, with all necessary and [269]

Phone East 421

Office and Yard Foot Belmont St.

Most Central Yard in the City.

JOSEPH SUPPLE.

SHIP YARD AND MARINE WAYS.

Portland, Oregon .....

I. N. Co. 2

customary outfit and equipment; bar room, with fixtures; engine room; store room and crews quarters. All of these to be well lighted by windows in

sides, and all wood work to be neatly finished and painted. Above this I will build a main cabin, about 100 feet long, containing 5 staterooms, ladies toilet; baggage rack over boiler; stairway to dining room, and furnish about 160 plush Pullman *relining* chairs; cabin to be lighted by about 120 windows in side.

On top of hurricane deck, I will build a pilot house and texes, containing rooms for Captain and mates. I will equip these cabins with everything necessary such as chairs, settees, seats, linoleum on floors and runners, piano in upper cabin, window curtains on brass rods; coolers; cuspidors; folding chairs and chairs; radiators; door mats, framed notices; complete stateroom outfits, wash stands, crockery; hardware; safe in purser's room; galley and dining room outfit, including pots and kettles, granite ware, table utensils, linens, silver ware, glass and china ware, all properly hung and housed in racks, shelves, lockers and cupboards, etc.

The equipment further to include fire extinguishers, fire hose, all electric light fixtures; call bell and annunciator; complete bar room equipment and stores, in fact everything necessary for operation and serving.

The whole joiner work and hull to be neatly painted and decorated. In hull equipment to be included everything necessary for a steamer of this kind and in particular, 4 life boats and 4 sets of davids, with all equipment and gears and boat covering necessary and required by the U. S. Inspection Law. Four fire axes; fire buckets, fire hydrants and hose with nozzles; about 400 life preservers,

two life rings, two life rafts, 3 anchors of 500 lbs. weight each, and 3/4 inch chain; fire ladders, relieving tackles, brass running lights with screens; gang planks, logs, flags, Government certificates, properly framed, and all spare deck gear and outfit generally provided.

In forward part of hull will be built fresh water tanks, and aft of them two steel oil fuel tanks of about 200 barrel capacity.

The steamer will be equiped with compound horizontal propelling engines on each side, on main deck aft, with cylinders having 15 $\frac{1}{4}$ " and 28 $\frac{1}{4}$ " bore and 72" stroke. Engine will be mounted on steel eye beams, extending outboard to support shaft bearings. These [270]

Phone East 421

Office and Yard Foot Belmont St.

Most Central Yard in the City.

JOSEPH SUPPLE.

SHIP YARD AND MARINE WAYS.

Portland, Oregon, .....

I. N. Co. 3.

engines will be built to turn a radical stern wheel, measuring 21' 6" over buckets, buckets having a width of 9' 7", 27 revolutions per minute. The engine will be fitted with all customary reversing and cut off gear and work condensing. Condensing apparatus to consist in an independent steel-shell condenser, containing about 963-3/4" tubes 8' 9" long; in an air pump of Blake's Simples pattern, of size 6 x 10 x 12 x 12.

Steam will be furnished by a locomotive type fire box boiler 24' long; 75" diameter on shell measuring in fire box 9' 6" in length; 6' 3" in width and 7' 9" in height. Boilers containing 258 2½" tubes, 14 ft. long, boiler to be tested for a working pressure of 160 lbs.

The propelling machinery further to include all necessary boiler, feed, bilge, circulating, cooler, fire and sanitary pumps, and all valves, pipes and fittings necessary for successful operation, also an electric light set of proper size to light all parts of ship and cabins, as well as search light on top of pilot house. I will furnish spare gear, tools, packing; gauges, lamps and lights and covering for pipes and boilers, in fact furnish everything necessary for operation and as good as on steamer "Telegraph."

I will guarantee that this machinery will drive such vessel at a speed of not less than 20 miles per hour.

The meaning of this proposal is that I will furnish everything complete for immediate operation of such steamer, whether hereintofore mentioned or not, and all for the sum above stated.

Yours respectfully,

JOSEPH SUPPLE.

[Indorsed]: Claimant's Exhibit "1." Filed August 12, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [271]

[Claimant's Exhibit No. 2—Proposal, Dated July 1, 1912, Heffernan Engine Works to Inland Navigation Co.]

HEFFERNAN ENGINE WORKS.  
ENGINEERS AND SHIP BUILDERS.  
108 RAILROAD AVENUE.

J. T. HEFFERNAN,  
Mechanical Engineer.

Telephone

Main 217

Terms of Warranty under which this Agreement, Offer or Acceptance is made are that new Material proving defective when used for the purposes ordered will be replaced. No claims for labor or damages will be allowed. All agreements are contingent upon strikes, accidents, delays of carriers and other delays unavoidable or beyond our control.

Seattle, Wash., July 1, 1912.

Inland Navigation Company,  
City.

Gentlemen:

Replying to your inquiry we propose to furnish and deliver complete, including government specification, a steamer duplicate of S. S. TELEGRAPH with the same size machinery, boilers, auxiliary machinery, and the hull to be constructed along the same lines as the present hull, complete in all details, including cabin furnishings and fittings and galley equipment complete for the sum of SEVENTY-NINE THOUSAND SIX HUNDRED (79,-

600) DOLLARS. Time required FIVE AND ONE-HALF 5-1/2) MONTHS.

Very truly yours,  
**HEFFERNAN ENGINE WORKS.**

By J. T. HEFFERNAN,

President.

[Indorsed]: Claimant's Exhibit "2." Filed August 12, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [272]

[Claimant's Exhibit No. 3—Proposal, Carlson Bros.  
to Inland Navigation Co.]

## C. J. Carlson. Long Distance Phone

CARLSON BROS.

## ARCHITECTS, BOATS AND SHIP BUILDERS.

## Plans and Specifications Furnished.

## Estimates Given Upon Request.

## REPAIRING A SPECIALTY.

## Port Blakely, Wash.

## Inland Navigation Co.,

Seattle, Wash.

Gentlemen:

We will Build and equip for Sound Service One Stern Wheel Steamer, Wood Hull, equal in all respects to Specifications for Str. "TELEGRAPH."

Hull 153' long, Breadth 27' Depth 8' Stern Wheel  
9' 7" wide, 21' 6" Diameter,

Engines: Two (2) tandem Compound Engines, Each 15-1/4" x 28-1/4" x 6' Stroke, Independent Steel Shell Condenser Containing about 1646 square feet of cooling surface, all necessary auxiliary machinery, One Fire Box Boiler designed for 160 lbs. Pressure, 75" Diameter, 24' long, with total heating surface 2608 square feet, Hydraulic Steering Gear, Boiler fitted with Oil Burner, Fuel Oil Tank Capacity about 200 Barrels.

For vessel fully equipped, ready for service, afloat F.A.S. Dock Port Blakely, Harbor, Seven Months from date of Order for, Eighty Eight Thousand (\$88,000.00) Dollars.

Respectfully Submitted.

CARLSON BORS.

By C. J. CARLSON.

CJC.

[Indorsed]: Claimant's Exhibit "3." Filed August 12, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [273]

[Claimant's Exhibit No. 4—Proposal, Dated July 5,  
1912, Crawford & Reid to Joshua Green.]

James Reid, Tel. 7307.

F. M. Crawford Tel. 7237

Yard Tel. 281.

CRAWFORD & REID,  
Designers and Builders

of

Wooden Vessels.

Tacoma, Washington, U. S. A.

Codes Used:

Scott's, Watkins A 1

A. B. C.

July 5, 1912.

Mr. Joshua Green, President,  
Seattle, Wash.

Dear Sir:

We have your favor of the 29th ult. since which time we have been getting data on the S. S. "Telegraph" hence our delay in answering, and furnishing our tender.

We will agree to duplicate the Str. "Telegraph" for the sum of Eighty seven thousand two hundred and fifty dollars, (\$87,250.00) as follows:

Lines of hull and design of cabins and equipment to be approved by you, boilers and engines, same size as former Telegraph, material and workmanship to be of the best.

We do not care to guarantee speed. We would require six months in which to complete this vessel.

Yours truly,

CRAWFORD & REID.

Per F. M. CRAWFORD.

[Indorsed]: Claimant's Exhibit "4." Filed August 12, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [274]

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[Claimant's Exhibit No. 5—Proposal, Dated July 1, 1912, King & Winge to Joshua Green.]

T. J. King.

Office:

A. Winge.

3500 R. R. Ave., S. W.

Phone Ind. W. 10

### KING AND WINGE.

Ship Builders and Contractors.

Models, Plans and Specifications Furnished.

All Kinds of Marine Drawings.

Repairing of All Kinds Promptly Done.

MARINE WAYS AT WEST SEATTLE

FOR TAKING OUT VESSELS.

Seattle, Wash., July 1, 1912.

Mr. Joshua Green Pres.

The Inland Navigation Co.,

Seattle, Wash.

Dear Sir:

We will build a Stern Wheel Steamer, 153ft long, 27ft wide, 8ft deep. Stern Wheel to be 21ft 6in in

diameter and 9ft 7in wide. With two tandem compound engines  $15\frac{1}{4} \times 28\frac{1}{4}$  x 6ft Stroke on Fire Box Boiler, carrying 160 pounds working pressure, 75in in diameter by 24ft long. Total heating surface about 2700 square ft, independent steel shell condenser, and all necessary auxiliary machinery. Hydraulic steering Geer, oil burners and fuel oil capacity for 200 Barrels. Passenger cabin, having plush reclining chairs and to be finished with everything on board, *a*

A Duplicate of the Steamer Telegraph to be finished in 6 Months for the Sum of \$86,000.00.

Yours very truly,

KING & WINGE.

Per THOS. J. KING.

[Indorsed]: Claimant's Exhibit "5." Filed August 12, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington. Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [275]

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[Claimant's Exhibit No. 6—Specifications.]

SPECIFICATION FOR REPAIRS STR. "TELEGRAPH."

Tenders are hereby requested for making the following enumerated repairs:

**HULL:**

Hull to be jacked into position so the vessel will be fair to her original line.

New hog posts to be fitted both sides and amidships, including two at the stern of the vessel.

Hog chains to be removed, faired and returned to place and set up firmly so as to hold the vessel in her original position.

**SIDE PLANKING:**

60 ft. of the gunwale strake and 10 planks below were damaged by the collision on the stbd. side to be removed and replaced with new. The renewal to be to the original butts.

**FRAMES:**

5 frames in the way of the collision damage on stbd. side to be removed and renewed to their original butts.

**CLAMP STRAKES:**

2 clamp strakes in the way of the damage on the stbd. side to be removed to the original butts and replaced by new, new planking to be securely bolted through frames.

**BILGE STRINGER:**

One length of bilge stringer planking to be removed to the original butts and replaced by new. This stringer to be securely bolted through the outer planking frames. [276]

**GARBOARD STRAKES:**

Both garboard strakes to be removed entire length of vessel, one length of main keel to be taken out where it was damaged by the lifting wires, and a new keel place fitted to original butts. The entire length of keel to be fastened through the frames and center truss with 5/8" bolts secured with nuts on the inside. An additional bolt through each alternate frame and the main truss secured with inside nuts.

On completion of this fastening, the garboard strakes to be by new.

Two planks to be removed on each side of the vessel under the outer trusses, 5/8" bolts driven through each alternate frame and the truss, secured on the inside with nuts. Outer planking to be replaced as before.

The outer planking at the stern of the vessel where damaged by the lifting wires, to be removed and replaced by new.

Two knees supporting the wheel timbers to be removed and refitted with new bolts or renewed if found necessary.

Additional spikes to be driven in each outside plank in every alternate frame, spikes to be of galv. iron and of same size as those used in original construction.

All butts to be refastened.

The entire hull to be well calked and seams cemented.

The main trusses to be gone over and all bolts and rods securely set up. Any damaged or broken parts to be repaired or renewed.

While the outer planking is off the entire interior [277] of the hull to be thoroughly cleaned out and all iron work scraped and painted.

#### MAIN GUARDS:

On both sides to be removed and a new box guard of the same pattern fitted. The outer planks of the guard to be of oak or other suitable hardwood.

Two extra clamp strakes to be fitted on each side of the vessel below the existing clamp strakes and

of the same size and secured in the same manner, extending entire length of vessel.

#### RUDDERS:

Main rudder to be examined and put in good working order. The stock of the monkey rudder to be faired, all the iron framework to be faired, rudder refitted and put in good working order.

#### MAIN DECK:

12 main deck beams to renew.

3 main deck beams on the stbd. side in the way of damage to be removed and replaced by new.

The short beams in the way of the oil tanks to be removed to admit of the tanks being taken out, and new beams fitted after the tanks are replaced.

The entire main deck planking to be removed and replaced with  $1\frac{1}{2}$ " clear seasoned T&G fir, dressed on one side. Deck to be laid with white lead close jointed and secured to the beams with 4" galv. iron spikes. This deck must be fitted snug around the cylinder beams, hatch coamings, etc. Seams around all such parts to be [278] calked and made tight. This deck in the engine room to be covered with a light sheathing fitted athwartships same as present sheathing.

#### MAIN DECK HOUSE:

Entire length of vessel to be removed and renewed, all scantling and planking to be replaced conforming with size and plan of the present house as per drawings supplied. Beams and uprights to be  $1\frac{1}{4}$ " x  $3\frac{1}{2}$ " except every sixth upright and beam which is 2" x 4" fitted with hanging knees. The lower half of the house is to be double planked fitted with win-

dows above, each alternate window to open. Windows to extend from the forward gangway right aft on both sides, a window to be fitted between each frame and doors on each side as shown in plans. The forward end of this house including the cargo gangway is not fitted with windows but to be planked right up. Cargo gangway doors on each side to be made portable.

#### SALOON DECK:

Extending the entire length of vessel, planking to be all removed and deck relaid with clear fir T&G dressed on both sides. Deck to be laid on the beams of the main deck house already described, laid in white lead close jointed and secured to the beams with 3" galv. iron nails. Center stringer on each side fore and aft entire length of the deck supported by turned pillars.

Covering board 1½" x 6" fitted around the outer edge of this deck to carry the guard rails.

Deck to be covered with canvas No. 3 on the outside part of the house. [279]

#### SALOON DECK HOUSE:

To be entirely removed and a new house fitted as per drawings supplied. The sills to be 2" x 3" nailed to the deck. The beams and verticals 1" x 3", every sixth beam and vertical to be 2" x 3" and fitted with hanging knees. The windows to extend the entire length of the house around the fore and after and except in the way of the crews quarters and ladies lavatories. Windows to be fitted between each frame, each alternate window opening, one door fitted forward and aft on each side. The lowest

part of the house to be lined inside the first three feet of its height, to have a moulding finish throughout.

#### UPPER DECK:

To extend from 12" feet forward of the saloon deck house to the after part of the vessel and the full beam of the ship, to be laid with  $\frac{3}{4}$ " T & G clear fir dressed both sides laid in white lead, close jointed and secured to the house beams with  $2\frac{1}{2}$ " galv. iron nails. The extended sides and ends of the deck to be supported turned pillars, morticed into the covering board top and bottom, spaced 8 ft. apart. The entire deck to be covered with No. 3 canvas.  $\frac{1}{2}$ " iron rod extending from deck to deck to be fitted beside each pillar. One pair of boat chocks fitted on each side in a suitable position abreast of the davits. Chocks to be made of an approved pattern with the outer halves hinged to facilitate the release of the boat.

#### SALOON SKYLIGHT:

A skylight to be fitted over the center of the upper deck 40' x 6' constructed with a flat top and windows at the sides pivoted at the center of the [280] frames, so arranged that each window can be opened. Windows to be glazed with heavy plate glass and fitted with fasteners on the inside. Top of skylight to be covered with No. 3 canvas.

#### PILOTHOUSE:

To be renewed and a new house fitted in accordance with the drawings supplied. To be built of clear fir T&G lined throughout. Framing to conform with sizes of the present house. Each window

to open and be fitted with strong fasteners and wedges. All windows and doors as per drawings. The interior of the house to contain hand and hydraulic steering-gear wheel and lever respectively, whistle lever and whistle lines with sheaves and leads for same. The top of the house to be covered with No. 3 canvas.

#### TEXAS:

To be fitted as per drawings supplied. Old house to be removed, new house fitted, built of double dressed T & G fir, lined inside and divided with a center fore and aft bulkhead. The port side to contain one berth with wardrobe, drawers, one wash-stand, one toilet rack, necessary coat hooks. The stbd. side to be fitted in the same way. Top of house to be covered with No. 3 canvas.

#### CREW'S QUARTERS:

The purser, engineer and steward's rooms to be fitted on the port side of the saloon house and each to contain a berth fitted with wardrobe drawers underneath, wash stand complete, toilet racks and upholstered settees and necessary coat hooks. On the stbd. side of the saloon house one spare room fitted with berth and wardrobe drawer, wash stand complete, upholstered settee, toilet rack and necessary coat [281] hooks. One bath room and lavatory with enameled tub and fittings complete.

Rooms for the deck hands and stokers to be built on the after part of the main deck, be fitted with berths and mess table as before.

#### STORE ROOMS:

Lamp locker to be fitted right forward correspond-

ing in size to the old locker, this locker to be lined with zinc. Two store rooms fitted on the forward deck amidships and just aft of the cargo gangways. These rooms open one on each side, have a center bulkhead and are fitted with shelves for deck stores, hoses, etc. One store room in the engine room built on the fore part of the crews quarters, this is about 4 ft. high, the top forms a bench underneath which is fitted shelves for tools and spare gear. One store room opening off the galley fitted with shelves for steward's stores. One locker in the dining room fitted with shelves and bench underneath forming side board.

The space around the boiler to be cased in with 1" T & G. fir dressed on one side, close jointed and built on a 2"x3" frame.

Space above the boiler on the saloon deck to be fitted with a portable cover over the steam drum and safety valve, cover to be constructed of 1" T&G fir dressed on one side and built on a 2"x3" frame.

#### GALLEY:

To be thoroughly cleaned out, the stove to be overhauled, cleaned and replaced and new hood to be fitted, and the partition at the back of the stove to be lined with asbestos and covered with new zinc plates. Galley stove pipe renewed and refitted as before [282] Galley sink and dresser to be removed, renewed and refitted as before. Fresh water pump to be removed, overhauled and refitted. Plate rack to be removed and a new plate rack fitted. A new ice box of the same dimensions as the old one to

be supplied and fitted. New coal locker same dimensions as old one to be fitted.

#### DINING ROOM:

Fitted with lockers, tables and chairs as before. Bulkheads placed as per plans supplied.

#### BAR ROOM:

To remit with lockers and racks, wash board, sink, ice chest and counter as before.

#### LAVATORIES:

One ladies lavatory fitted on saloon deck with cisterns, water tank and drains complete.

Five lavatories for crew and passengers to be fitted on the main deck forward of the cargo gangways with cisterns and supply tanks complete. All undamaged parts in the present lavatories to be used, any lost or broken parts to be renewed.

#### PLUMBING:

All toilets to be removed, cleaned and refitted as before, any broken or missing parts to renew, tanks, cisterns and drain pipes to clean and refit or renew where lost. Scupper and sink pipes to overhaul and refit as before. Washbowls in the Captain's and officers' rooms to renew where broken and all drain pipes to refit from each bowl as before. All supply and waste pipes in connection with the bath tub including faucets and plug to be overhauled, repaired or renewed as found necessary.

#### HEATING SYSTEM:

All heaters and piping in connection therewith to be removed, cleaned and refitted as before, any lost or broken parts replaced by new. [283]

**STEERING GEAR:**

The hydraulic steering gear to be overhauled, cleaned and put in good working order; all sheaves and leads under the deck in connection with this gear to be cleaned and put in good working order. All wire and chain parts of this gear to be overhauled; new wire parts supplied, chain parts cleaned and refitted. Tiller and rod in the pilothouse to be cleaned and put in good working order. After being connected the hydraulic steering gear must be tested and left in good working order.

**HAND STEERING GEAR:**

All wire and manila ropes to be removed, chain parts to be cleaned and refitted. All sheaves and leads to be cleaned and refitted. The wheel barrel and frame to be cleaned and varnished and steering gear connected up and put in good working order.

**STAIRWAYS:**

The main stairway leading from the saloon to the dining room to be removed and a new stairway fitted with rubber treads and brass facing pieces. A new guard rail to be fitted around the stairway opening in the saloon deck, consisting of newel posts, hand rail, banister and covering board, all constructed of clear fir machine turned.

One stairway on the forward part of the saloon house leading from the saloon deck to the main deck, stairs to be removed and replaced by new, new hand rails fitted around the opening.

One ladder leading from the saloon to the upper deck fitted with hand rails complete, placed on the

forward part of the house amidships. Hand rails are to be piperails conforming with the guard rail on upper [284] deck.

#### **GUARD RAILS:**

Rail to be fitted all around saloon deck, built of turned stanchions 4 ft. apart, morticed into a covering board at the foot and hand rail at the head. Wire netting secured to the hand rail, covering board and stanchions so as to prevent anything from falling over board between the rail, fitted right around the vessel and to form part of this guard rail.

2 portable gangways on each side to be fitted in this rail.

A 1" pipe guard rail to be removed from the upper deck forward and fitted on the new deck in same position as before. Any lost or damaged parts to be renewed.

#### **DAVITS:**

One pair of davits to straighten and refit on each side of vessel. Metal heel sockets on saloon deck to be refitted, if lost, renewed and refitted. These davits to be fitted each with one pair of double blocks and a suitable rope fall long enough to lower the boat into the water. Wire guys and span with lashings and suitable eye bolts in the deck to make fast fitted complete.

#### **LIFE BOATS:**

2 life boats of approved size and pattern supplied with a full set of oars, boat hooks, rudder, tiller, water breaker, bailer, plugs, lamp, oil can, row locks and painter complete in each boat and the boats fitted in the chocks on the upper deck.

Name boards fitted on each side and above the pilot house.

**STERN WHEEL BOX:**

Wheel to be removed and a new one fitted same style and scantling as the old box. Vertical [285] bracing stanchions fitted every 15 ft. from the guard to the top of the main deck house.

**VENTILATORS:**

2 ventilators extending from the main deck up to be fitted as before.

**FLAG STAFF:**

Two flag staffs, one forward and one aft to be fitted with suitable sockets and parrels, each to have a truck into which a pair of single halyards must be rove.

**CLEATS:**

4 mooring cleats on each side to be removed and refitted.

**WARPING CHOCKS:**

On each side of the ship to be removed and re-fitted.

**MAIN DECK SEATS:**

26 garden seats secured to the main deck forward to be renewed. Garden seats attached to the rail on saloon deck to be renewed.

**PAINTING:**

The entire hull of vessel outside to have two coats of approved paint. All new and interior house work to have three coats of approved paint inside and out. All canvas decks to have three coats of paint. The stern wheel box to be painted inside and out. The

stern wheel to be given two coats of paint. The connecting rods to be painted. The ship's name to be painted on bow and on each name *boatd*.

One dozen new fire buckets to be fitted in racks on upper deck.

3 funnel guys to be fitted to the new stack and suitable bolts for lashings fitted in the upper deck.

All rooms throughout the ship to have name plates fitted above the doors. All notices throughout the vessel to be renewed and refitted. All doors and [286] windows throughout the ship to be fitted with suitable locks, handles, hooks, straps and fastenings as may be necessary.

Blue-prints of the profile and deck plans will be supplied and are to be considered as part of this specification. [287]

#### BOILER:

The boiler to be cleaned internally; all lagging on the outside removed and the shell plating cleaned and given two coats of red lead paint. Mountings and pipe connections to be overhauled, repaired where necessary and put in good order and condition. To be tested by hydraulic pressure to 50% above the steam pressure allowed before the accident; and any leaking seams, tubes and mountings to be made good. Steam to be raised on the boiler and safety valve adjusted to the same pressure as before the accident, and after everything is satisfactory, the outside to be covered with asbestos lagging as before.

The furnace doors to be put in good condition, fire bars replaced or renewed where missing or broken

and all bricks in the furnaces replaced and made good.

Steam and water gauges to be replaced with new.

The uptake and casing through the passenger deck to be repaired and refitted and a new smokestack with a suitable damper and umbrella to be supplied and fitted in place and secured with wire guys.

A new iron waste steam pipe from the safety valve to be fitted on the after side of the smokestack and a new iron whistle pipe with suitable whistle to be fitted on the forward side, the whistle to have a suitable lanyard lead to the pilot house.

#### OIL FUEL SYSTEM:

The oil pump and accessories to be overhauled and put in good working condition; all pipes and valves in connection with the oil fuel system to be renewed where broken or damaged, and new oil burners of same pattern as before to be installed. [288]

#### MAIN ENGINES:

The cylinders, pistons and piston valves to be opened out, cleaned and put back in good working order and condition; crosshead and crank pin brasses to be adjusted. All working parts of the engines to be cleaned bright or painted as necessary. Cylinder I beams and holding down bolts to be hammer tested and set up where required. Cylinder and steam check lagging to be removed and renewed.

#### WHEEL:

Main bearings to be cleaned and adjusted. Shaft to be set in alignment with center of cylinder. All bent iron work to be faired and one broken wood float to renew.

**AUXILIARY, ENGINES, PUMPS, etc.:**

Feed, circulating, air, fire, sanitary, fresh water and hydraulic pumps to be opened out cleaned and put in good working order and condition. All steam suction and discharge pipes and valves leading to and from the several pumps throughout the vessel to be put in good order and renewed where damaged or missing. Pipes to be covered with asbestos as before.

Bilge pipes and syphons and 3 deck pumps to be overhauled and put in good working order.

**HOTWELL, etc.:**

The hotwell and filter tank to be cleaned and painted and all pipe connections and valves overhauled and put in good condition.

**CONDENSER:**

The condenser to be opened out, tubes and water passages cleaned and the condenser put in good working condition.

**MAIN STEAM PIPE, etc.:**

Main steam pipe between boiler and [289] engines and the exhaust pipe between the engine and condenser to be overhauled, all joints made tight, expansion joints repacked, stop valves overhauled and pipes covered with asbestos as before.

**DYNAMO, etc.:**

The dynamo, engine and governors to be opened out, cleaned and replaced in good working condition, armature and fields to be rewound, commutator segments insulated and trued in lathe. Brush holder repaired or renewed and new brushes fitted.

Switchboard to be cleaned and refitted in place. Switches, ampere and volt meters and connections between the dynamo and the leads and circuits to be renewed. Rheostat with all wire connections and fittings and pilot lights to be fitted as before.

All wiring throughout the vessel to be removed and replaced by new.

All switches, cutouts, conduits, light fixtures, globes and shades throughout the vessel to be removed and refitted with new.

Search light to be removed, cleaned and refitted and put in good working order.

Signal, compass and steering lights fitted as before.

#### ENGINE ROOM FITTINGS:

Steam and vacuum gauges and a clock, also signal bells and speaking tube between the pilot house and engine room to be renewed.

#### TANKS:

Fuel oil tank located forward of the boiler to be lifted out of the vessel, and after end and top to be faired or repaired; wash plates and stays inside faired [290] or repaired. Tank to be cleaned inside and the outside cleaned and painted and tested by water pressure. Lead pan underneath the tank to be repaired. Tank replaced in position and secured in place as before. Oil suction pipe, filling and vent pipes to be repaired or renewed and refitted as before.

Fresh water tank forward of the fuel oil tank to be cleaned and made water tight and the filling suction and air pipes refitted as before.

**NOTE:**

The following items which are included in the specifications have already been done to enable the vessel to be floated may therefore be left out by those bidding on this work:

Ship has been jacked into line.

New hog posts have been fitted and the hog chains faired, placed and set up.

The gunwale strake planking and 10 planks in the way of the damage have been renewed.

Five and one half frames have been renewed.

The clamp strakes have been renewed.

The bilge strake plank has been renewed.

Monkey rudder has been faired and replaced, together with its framing.

The main rudder has been overhauled and found in good order. [291]

**CONDITIONS.**

Vessel is now near Heffernen Dry Dock where she can be seen by intending bidders.

It is understood that the successful bidder is to take the vessel from where she now lies all at their risk and expense and upon completion of repairs to return her to any dock in Seattle the owners may designate.

All work to be done to the satisfaction of owner's representative and surveyors appointed, and all material used to be of good quality. No extras of any nature whatsoever will be allowed unless previously agreed upon in writing between the parties interested.

Any portion of the vessel removed for the purpose

of carrying out any of the above enumerated repairs to be replaced as before at contractor's expense.

All dirt and rubbish accumulated during the course of repairs to be removed by the contractor and old material to become the property of contractor.

The right is hereby reserved to reject any or all tenders and any tender not complying with the above requirements will not be given consideration.

Contractor to keep vessel insured during repairs for the sum of \$30,000 against fire risk only.

A penalty of \$100 per day will be exacted for every day of 24 hours each in excess of time specified in the tender and a bonus of \$25 for every 24 hours will be paid for every day under specified time named in tender. The bonus and penalty applies to working days.

The tenders must be submitted one for the hull exclusive of the main deck and guards, the other for the [292] entire balance of specifications. Bids may be submitted for either or both.

Sealed tenders distinctly stating price and time required for the full and proper performance of the work to be submitted to the Alaska S. S. Co., Lowman Bldg., Seattle, at 2 P. M., June 5, 1912.

[Indorsed]: Claimant's Exhibit "6." Filed August 14, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [293]

[Libelant's Exhibit "A"—Proposal, Dated June 22, 1912, Seattle Construction and Dry Dock Co. to Inland Navigation Co.]

Note.—Quotations are subject to change without notice. All Agreements are contingent upon Strikes, Riots, Lockouts, Fires, Floods, Accidents, Inability to secure Cars or Transportation, Acts of God or other Cause of Delay Beyond our Control. Vessels are moved at Owners' risk only.

### SEATTLE CONSTRUCTION AND DRY DOCK COMPANY.

Shipbuilders, Engineers, Boilermakers, Founders, Lumber Manufacturers.

Office and Works

Railroad Avenue Foot of Charles Street.

J. V. Paterson, Pres. & Gen. Manager.

R. S. Wolcott, 1st Vice-President.

H. A. Evans, 2nd Vice-President.

H. W. Kent,

Secretary & Treasurer.

SEATTLE, WASHINGTON, June 22, 1912.

Inland Navigation Co.,

CITY.

Gentlemen:—

We will build and equip for Sound Service, one wood hull, stern-wheel steamer, equal in all respects to specifications of Str. "Telegraph."

Hull: 153' long; breadth 27', depth 8', Stern wheel 21' 6" Diam., by 9' 7" wide.

Engines: Two (2) tandem compound engines, each  $15\frac{1}{4}'' \times 28\frac{1}{4}'' \times 6'$  stroke. One firebox boiler designed for 160 lbs. working pressure, 75" diam., by 24' long, total heating surface 2608 square feet. Independent steel shell condenser containing about 1642 square feet of cooling surface; all necessary auxiliary machinery, hydraulic steering gear; boilers fitted for burning oil, capacity of fuel oil tanks about 200 barrels.

For this vessel, fully equipped ready for service, afloat in Seattle Harbor, we quote you ..... \$92,400.00 and if awarded contract for this boat, we could make delivery of same in 5 months thereafter.

Yours very truly,

SEATTLE CONSTRUCTION & DRY DOCK COMPANY,

J. V. PATERSON,  
General Manager.

GEH.

W. S. M. [294]

[Indorsed]: Libelant's Ex. "A." Filed Aug. 8, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [295]

**Libelant's Exhibit "B"—[Proposal, Dated July 13,  
1912, Everett Marine Ways to Inland Naviga-  
tion Co.]**

Chas. E. Durham, Manager.

C. J. Whitney, Sec'y-Treas.

Office:  
Bayside Iron Works  
Both Phones 843.

**EVERETT MARINE WAYS.**

Ship Builders and Contractors.

Models, Plans and Specifications Furnished on  
Application.

Repairing of all Kinds Promptly done.  
Gridirons.

Marine Ways for Taking Out  
Vessels at Bayside Iron Works.

Accommodations for Passengers.  
Boats, Tugs, Launches, Scows.

**EVERETT, WASH., July 13th, 1912.**

Inland Navigation Co.,  
Seattle, Washington.

Gentlemen:—

Replying to your inquiry for tenders on a stern-wheel steamer length 153 ft., beam 27 ft., depth 8 ft., speed 20 miles per hour, practically a duplicate of Steamer Telegraph.

Could deliver above complete in six months from acceptance of specifications and signing contract for \$86,500.00.

Yours very truly,  
**EVERETT MARINE WAYS,**  
**H. B. LOVEJOY, Pres.**

[Indorsed]: Libelant's Exhibit "B." Filed 12th August, 1912. A. C. Bowman, U. S. Com'r. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [296]

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*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 2152.

INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Stipulation to Take Depositions [of E. W. Spencer  
and Arthur Riggs].**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause, through their respective proctors, herein, that the depositions of E. W. Spencer and Arthur Riggs, witnesses in behalf of the claimant herein, who now reside at the city of Portland, State of Oregon, and more than one hundred miles from the place of trial of the said cause, and who will not be present at the

trial of said cause, may be taken in said city of Portland, State of Oregon, before J. P. Hannon, Notary Public, at the said city of Portland in said State, at the office of said Notary Public at No. 510 Wells Fargo Building in said city, at such time as may be convenient for said notary and said witnesses, said depositions to be taken and returned with all convenient speed.

Said depositions shall be taken upon the Interrogatories and Cross-interrogatories hereto attached, and all formalities attending the taking of said depositions are hereby waived by the said parties, excepting that all objections to materiality, competency and relevancy of the Interrogatories and the testimony taken thereunder may be raised by either party at the time of the trial. Said [297] witnesses shall be duly sworn by the said notary public and their answers to the Interrogatories and Cross-interrogatories shall be reduced to writing or type-writing and signed by them, after which said depositions shall be returned to the Clerk of the above-named Court by said notary public with his certificate as to the taking of the same, and said depositions may be read in evidence at the trial by either party with the same effect as if said witnesses were personally present and testifying therein.

Dated January 22, 1913.

IRA BRONSON,

Per J. S. ROBINSON,

Proctor for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Respondent and Claimant. [298]

*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Direct Interrogatories to be Propounded to E. W.  
Spencer.**

Direct Interrogatories to be propounded to E. W.  
SPENCER, a witness on behalf of claimant, pursuant  
to the annexed Stipulation:

Interrogatory No. 1:

State your name, age, place of residence and oc-  
cupation.

Interrogatory No. 2:

If in answer to the last Interrogatory you state  
that you are a master mariner, state how long you  
have been such.

Interrogatory No. 3:

Have you ever been engaged in the business of  
shipping and transportation by water at Portland,  
Oregon, and if so, when and for how long, and what

vessel or vessels did you own, operate or were master of?

**Interrogatory No. 4:**

Were you ever the owner or principal owner or master of the stern-wheel steamer "Spencer," formerly operated from Portland, Oregon, and if so, when, how long and where did you operate said vessel? [299]

**Interrogatory No. 5:**

Were you familiar with the stern-wheel steamer "Telegraph" while she was being operated on the Willamette and Columbia Rivers out of Portland?

**Interrogatory No. 6:**

If you answer Interrogatory No. 4 in the affirmative, state fully what kind of a vessel the steamer "Spencer" was, giving her size, age, condition and speed.

**Interrogatory No. 7:**

State, if you know, how the steamer "Spencer" compared in size, age, condition, speed and value with the steamer "Telegraph."

**Interrogatory No. 8:**

Did you sell the steamer "Spencer," and if so, when, to whom and for what price, and state whether such sale was a voluntary sale or forced, and whether such purchase was voluntary or was the purchaser compelled or forced to purchase said vessel, or under necessity of having her?

**Interrogatory No. 9:**

It has been testified in this case that the "Telegraph" was the fastest stern-wheel vessel ever constructed. State, if you know, whether or not this

is correct, and if you say it is not, state what other stern-wheel vessel or vessels was or were faster, and give fully your means of knowledge of such fact.

Interrogatory No. 10:

State any fact or facts within your knowledge which would tend to show the fair, reasonable market value of the "Telegraph" at the time and place she was sunk.

**BOGLE, GRAVES, MERRITT & BOGLE,**  
Proctors for Respondent and Claimant. [300]

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*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

**INLAND NAVIGATION COMPANY, a Corpora-  
tion,**

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,

Respondent.

**ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,**

Claimant.

**Direct Interrogatories to be Propounded to Arthur  
Riggs.**

Direct Interrogatories to be propounded to ARTHUR RIGGS, a witness on behalf of Claimant, pursuant to the annexed Stipulation:

Interrogatory No. 1:

State your name, age, place of residence and occupation.

Interrogatory No. 2:

If you say that you are a master mariner, state how long you have been such.

Interrogatory No. 3:

Were you ever master of the stern-wheel steamer "Telegraph" formerly operated on the Seattle-Everett run on Puget Sound, and the Portland-Astoria run on the Willamette and Columbia Rivers, and if so, how long were you such master of said vessel?

Interrogatory No. 4:

Did you ever operate the said steamer "Telegraph" at her full speed? [301]

Interrogatory No. 5:

If you answer the last Interrogatory in the affirmative, state, if you know, what the maximum speed of the "Telegraph" was in dead water.

Interrogatory No. 6:

State the maximum speed at which you ran the "Telegraph" at any time, taking into account any effect the tide or current had upon the speed of the "Telegraph" at such times.

Interrogatory No. 7:

It has been testified in this case that the "Telegraph" was able to make a speed of twenty statute miles per hour. State whether or not, in your opinion, the "Telegraph" was capable of making such speed without the assistance of tide or current.

Interrogatory No. 8:

It has been testified in this case that the said steamer "Telegraph" was the fastest stern-wheel vessel ever constructed. State if you know, whether or not this is correct, and if you say it is not, state what other stern-wheel vessel or vessels was or were capable of making greater speed, and how you know such fact.

Interrogatory No. 9:

It has been claimed that while the said steamer "Telegraph" was being operated out of Portland, she carried a broom at her mast-head to indicate that she claimed to be the fastest stern-wheel vessel operating out of said city. State whether or not this is correct. Also state whether or not any other stern-wheel vessel or vessels at Portland, during the time the "Telegraph" was operated out of said city, carried a broom at her mast-head, or claimed to be a faster vessel than the "Telegraph."

Interrogatory No. 10:

State fully any facts within your knowledge tending to [302] show the maximum speed of the steamer "Telegraph" while you were master of her.

BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Respondent and Claimant. [303]

[Answers of E. W. Spencer, for Claimant, to Direct Interrogatories.]

*In the United States District Court, for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

E. W. SPENCER, a witness on behalf of claimant herein, produced as such witness pursuant to the annexed stipulation, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, makes answer to the several direct interrogatories attached to said stipulation, as follows:

Answering direct interrogatory No. 1, the witness says: "My name is E. W. Spencer; I am 60 years of age; I reside at 161 Broadway, Portland, Oregon; I am a master mariner."

Answering direct interrogatory No. 2, the witness says: "I have been a master mariner for 38 years."

Answering direct interrogatory No. 3, the witness

says: "I have been engaged in the business of shipping and transportation by water at Portland, Oregon, for 38 years, since 1875. I have operated the steamers 'Ohio,' 'City of Salem,' 'Salem,' 'Spokane,' 'John Gates,' 'Almota,' 'Cricket,' 'Gold Dust,' and 'Spencer.' I was sole owner of the steamer 'Spencer.'" [304]

Answering direct interrogatory No. 4, the witness says: "I was owner of the stern-wheel steamer 'Spencer' for nine years, from 1902 to 1911, and operated her between Portland, and Astoria, Oregon, a portion of the time and between Portland and The Dalles, Oregon, a portion of the time."

Answering direct interrogatory No. 5, the witness says: "Yes."

Answering direct interrogatory No. 6, the witness says: "The steamer 'Spencer' was nine years old when I sold her two years ago. She is eleven years old now. She is 181 feet long; 31 feet beam and 6 feet hold. She was in a very good condition when I sold her, and I considered her about the speediest boat on the river at that time; 20 miles speed.

Answering direct interrogatory No. 7, the witness says: "When the steamer 'Telegraph' was on the Columbia River she was operated between Portland and Astoria, and on several occasions I was at that time running the steamer 'Spencer' to The Dalles. We both left Portland at 7:00 o'clock in the morning and we had several races between here and the mouth of the river. On several occasions we gained on the steamer 'Telegraph,' but, of course, being in the Willamette River, we did not have room to pass her

and at the mouth of the river we separated, the 'Telegraph' going down the river and the 'Spencer' going up to The Dalles. The 'Telegraph' was a much smaller boat than the 'Spencer.' If I remember correctly, she was 165 feet long, 26 feet beam and 9 feet hold. She had about 200 horse-power less than the 'Spencer.' She was a 19 mile boat. I would not have traded the 'Spencer' for the [305] 'Telegraph,' even trade. The 'Telegraph' had no freight capacity to speak of."

Answering direct interrogatory No. 8, the witness says: "I voluntarily sold the 'Spencer' two years ago to the Monarch Transportation Company for \$25,000. They bought her for use of towing and on river and excursions. They were not forced or compelled to purchase the steamer 'Spencer.' "

Answering direct interrogatory No. 9, the witness says: "The steamer 'Telephone' was a faster and much larger boat than the 'Telegraph' on the river here, and the 'Bailey Gatzert' was capable of making better speed than the 'Telegraph.' The reason I know is because we raced all of them several times with the steamer 'Spencer' and I know the ones we had our hardest battles with."

Answering direct interrogatory No. 10, the witness says: "After the 'Telegraph' left Portland, I had no means of knowing the money that was expended on her. I have never been acquainted with her since she left the Columbia until her accident and would not be in a position to state what condition she was in at that time or what her probable value would be then. When she left Portland, I did not consider her

as valuable as the steamer 'Spencer.' "

E. W. SPENCER.

Subscribed and sworn to before me this 27th day  
of January, 1913.

[Seal]

JOHN P. HANNON,  
Notary Public for Oregon. [306]

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[Answers of Arthur Riggs, for Claimant, to Direct  
Interrogatories.]

*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

ARTHUR RIGGS, a witness on behalf of claim-  
ant herein, produced as such witness pursuant to the  
annexed stipulation, being by me first duly sworn to  
testify the truth, the whole truth, and nothing but the  
truth, relative to said cause, makes answer to the sev-  
eral direct interrogatories attached to said stipula-  
tion, as follows:

**Interrogatory No. 1:**

State your name, age, place of residence and occupation.

Answering direct interrogatory No. 1, the witness says: "My name is Arthur Riggs; I am 43 years of age; I reside at 150 1st street; I am a master mariner."

**Interrogatory No. 2:**

If you say that you are a master mariner, state how long you have been such.

Answering direct interrogatory No. 2, the witness says: "I have been a master mariner for 10 years and mariner for about 16 years more, about 26 years altogether." [307]

**Interrogatory No. 3:**

Were you ever master of the stern-wheel steamer "Telegraph" formerly operated on the Seattle-Everett run on Puget Sound, and the Portland-Astoria run on the Willamette and Columbia Rivers, and if so, how long were you such master of said vessel?

Answering direct interrogatory No. 3, the witness says: "I was master mariner on the stern-wheel steamer 'Telegraph' in 1905 and in 1907, that is to say, 4 months in 1905 and 7 or 8 months in 1907."

**Interrogatory No. 4:**

Did you ever operate the said steamer "Telegraph" at her full speed?

Answering direct interrogatory No. 4, the witness says: "Yes."

**Interrogatory No. 5:**

If you answer the last interrogatory in the affirma-

tive, state, if you know, what the maximum speed of the "Telegraph" was in dead water.

Answering direct interrogatory No. 5, the witness says: "I do not know the maximum speed of the 'Telegraph' in dead water because I never timed her, but I did come up from Astoria to Portland against the current but had the benefit of the flood tide from Astoria to some point between Cathlamet and Eureka and then we were against the current from there up, and the time we made from Astoria to Portland was five hours and sixteen minutes. My judgment is that the distance run is about 90 miles."

[308]

Interrogatory No. 6:

State the maximum speed at which you ran the "Telegraph" at any time, taking into account any effect the tide or current had upon the speed of the "Telegraph" at such times.

Answering interrogatory No. 6, the witness says: "The time I ran from Astoria to Portland in five hours and sixteen minutes against the current but with the benefit of flood tide from Astoria to a point between Cathlamet and Eureka, and if the distance from Portland to Astoria is 90 miles, the maximum speed under ordinary circumstances was between 18 and 19 miles an hour. I think this was in August, 1905."

Interrogatory No. 7:

It has been testified in this case that the 'Telegraph' was able to make a speed of twenty statute miles per hour. State whether or not, in your opinion, the 'Telegraph' was capable of making such

speed without the assistance of tide or current.

Answering direct interrogatory No. 7, the witness says: I always thought she would on a short run. That is my opinion. I had an idea she would with favorable circumstances and with plenty of water under her, but I don't know because we never timed her."

**Interrogatory No. 8:**

It has been testified in this case that the said steamer 'Telegraph' was the fastest stern-wheel vessel ever constructed. State if you know, whether or not this is correct, and if you say it is not, state what other stern-wheel vessel or vessels was or were capable of making greater speed, and how you know such fact. [309]

Answering direct interrogatory No. 8, the witness says: "I do not think it is correct that the 'Telegraph' was the fastest stern-wheel vessel ever constructed. I think the 'Telephone,' a stern-wheel vessel, was capable of making greater speed. I judge this from her performances on the river while she was here at Portland and have seen her operate along with the 'Telegraph' many times."

**Interrogatory No. 9:**

It has been claimed that while the said steamer "Telegraph" was being operated out of Portland, she carried a broom at her masthead to indicate that she claimed to be the fastest stern-wheel vessel operating out of said city. State whether or not this is correct. Also state whether or not any other stern-wheel vessel or vessels at Portland, during the time the 'Telegraph' was operated out of said city, carried

a broom at her masthead, or claimed to be a faster vessel than the 'Telegraph.'

Answering direct interrogatory No. 9, the witness says: "She never carried a broom while I was on her. There never was but one broom on the river and that was fought out for between the old 'Telephone' and the old 'Potter.' As to whether or not any vessel carried a broom at her masthead, there never was a broom carried generally, but it may have been that when a boat got to the dock first on some of the runs out of Portland, the crew would put up a broom, but when I was master I never allowed it to be done. As to whether or not other vessels claimed to be faster than the 'Telegraph,' they all made such claims. Captain Spencer claimed his boat was the fastest and the owners of the 'Telephone' claimed [310] that she was the fastest and Captain Scott claimed his boat was the fastest."

**Interrogatory No. 10:**

State fully any facts within your knowledge tending to show the maximum speed of the steamer "Telegraph" while you were master of her.

Answering direct interrogatory No. 10, the witness says: "The only time was on that trip from Astoria to Portland when she came in in five hours and 16 minutes. Her ordinary speed was  $17\frac{1}{2}$  miles an hour. She ran that every day. I have her fog courses and figured her time from them. Those have to be correct and so I know that that was what she did."

ARTHUR RIGGS.

Subscribed and sworn to before me this 6 day of February, 1913.

[Seal]

JOHN P. HANNON,  
Notary Public for Oregon. [311]

[Certificate of Notary Public to Depositions of E. W.  
Spencer and Arthur Riggs.]

State of Oregon,  
County of Multnomah,—ss.

I, John P. Hannon, a Notary Public in and for the said County of Multnomah, State of Oregon, an officer duly authorized to administer oaths in said County and State, do hereby certify that the above and foregoing depositions of E. W. Spencer and Arthur Riggs, were taken before me at No. 510 Wells-Fargo Building, in the City of Portland, Oregon, the 27th day of January, and February 6, 1913, in pursuance of the stipulation hereto annexed; that before the said depositions were so taken, the said witnesses were by me each first duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that thereupon I propounded to said witnesses the annexed and foregoing direct and cross interrogatories to be propounded to said witnesses, and thereupon the answers of said witnesses to said Interrogatories and Cross-interrogatories so propounded to them, were by A. Hoode reduced to writing; that thereafter the said answers of said witnesses to such Interrogatories and Cross-interrogatories were carefully read by said witnesses and then subscribed by them in my presence; and I do further certify that I am not counsel nor attorney for any of the parties in said deposition and caption named,

nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and affixed my official seal this 6th day of February, 1913.

[Seal]                                    JOHN P. HANNON,

Notary Public in and for the State of Oregon, Residing at Portland.

Approved as to form:

IRA BRONSON,

Proctors for Libelant,

Per J. S. ROBINSON.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Respondent and Claimant. [312]

[Endorsed]: Stipulation to Take Depositions and Interrogatories to be Propounded to E. W. Spencer and Arthur Riggs. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 30, 1913. Frank L. Crosby, Clerk. By ———, Deputy. [313]

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*In the United States District Court, for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Stipulation to Take Deposition of C. W. Cook.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause, through their respective proctors herein, that the deposition of C. W. COOK, a witness in behalf of Claimant herein, who now resides at the City of San Francisco, State of California, and more than one hundred miles from the place of trial of the said cause, and who will not be present at the trial of said cause, may be taken in said City of San Francisco, State of California, before any Notary Public or other officer duly authorized to administer oaths in said State of California, at the said City of San Francisco in said State, at such time and place as may be convenient for such Notary or other officer and said witness, such deposition to be taken and returned with all convenient speed.

Said deposition shall be taken upon the Interrogatories and Cross-interrogatories hereto attached, and all formalities attending the taking of said deposition are hereby waived by the said parties, excepting that all objections to materiality, competency and relevancy of the Interrogatories and the testimony taken thereunder [314] may be raised by either party at the time of the trial.

Said witness shall be duly sworn by said Notary or other officer, and his answers to the Interrogatories and Cross-interrogatories shall be reduced to writing or typewriting and signed by him, after

which said deposition shall be returned to the Clerk of the above-named Court by said Notary Public or other officer taking the same, with his certificate as to the taking of the same, which certificate shall be in the form attached hereto and approved by the proctors of said respective parties, and said deposition when so taken and returned may be read in evidence at the trial by either party, with the same effect as if said witness were present personally and testifying therein.

Dated January 15th, 1913.

IRA BRONSON,  
Proctor for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Respondent and Claimant. [315]

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*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.  
INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Direct Interrogatories to be Propounded to C. W. Cook.**

Direct Interrogatories to be propounded to C. W. COOK, a witness on behalf of claimant, pursuant to the annexed Stipulation:

**Interrogatory No. 1:**

State your name, age, place of residence and occupation.

**Interrogatory No. 2:**

If in answer to the last Interrogatory you state that you are engaged in the business of transportation and shipping by water, state how long you have been so engaged in such business and in what capacities.

**Interrogatory No. 3:**

Were you ever engaged in such business at Seattle, Washington, and if so, when and how long, with what company, corporation, firm or person were you associated in such business at Seattle, and in what capacity and capacities.

**Interrogatory No. 4:**

Were you familiar with the stern-wheel steamer "Telegraph," formerly operated on the Seattle-Everett Line, and sold in the year 1909 to the Inland Navigation Company, Libelant herein, prior to the time she was sunk in Elliott Bay at Seattle, Washington, April 25, 1912? [316]

**Interrogatory No. 5:**

State, if you know, whether or not the "Telegraph" could have been taken to any other waters than Puget Sound, and if so, to what waters, and what, if any,

use could have been made of said vessel upon the waters of Puget Sound and adjacent waters, or any other such waters to which she could have been taken.

Interrogatory No. 6:

State, if you know, whether or not there was any market at Seattle, Washington, at the time the "Telegraph" was sunk, for the "Telegraph" and for vessels of her kind and type.

Interrogatory No. 7:

If you say there was such a market at Seattle, Washington, at said time, for such vessel, what, in your opinion, was the fair, reasonable market value of the "Telegraph" at said time and place. In answering this Interrogatory, you will consider such value as the price which in your opinion, said vessel would bring in said market if offered for sale by one who desired but was not obliged to sell, and was bought by one who was under no necessity of having it. You will also take into consideration all the capabilities of the vessel and all the uses to which it could be put, either at Seattle or elsewhere where said vessel could be taken and used.

Interrogatory No. 8:

There is testimony in this case to the effect that the "Telegraph" was the fastest stern-wheel steamer ever constructed. State, if you know, whether or not this testimony is correct.

Interrogatory No. 9:

It appeared in this case that the "Telegraph" was built principally for speed and for carrying passengers. State, if you know, whether or not such a vessel would be an economical vessel to operate.

**Interrogatory No. 10:**

State, if you know, if such a vessel would have as great earning capacity in the waters in which the "Telegraph" [317] could be taken or used, as a similar vessel of equal cost of construction and the same state of repair and condition, but with less speed and constructed also for carrying freight.

**Interrogatory No. 11:**

State, if you know, whether or not such a vessel would have as great a market value at said time and place as a similar vessel of equal cost of construction and the same state of repair and condition, but constructed also for carrying freight.

**Interrogatory No. 12:**

State any facts within your knowledge which will tend to show the fair, reasonable market value of the "Telegraph" at the time and place she was sunk.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant. [318]

**Cross-interrogatories to be Propounded to C. W. Cook.****Cross-interrogatory No. 1:**

If in answer to Interrogatory No. 6 you state that there was a market in Seattle at the time the "Telegraph" was sunk for vessels of her type, state whether or not the bidders in such market would be confined to persons and firms wishing her for passenger traffic.

**Cross-interrogatory No. 2:**

Do you know of any possible passenger route on Puget Sound where the "Telegraph" could be used

which is not already served by an established passenger line?

Cross-interrogatory No. 3:

Do you know of any established line operating on Puget Sound which would have desired to purchase the "Telegraph" on or about April 25th, 1912, had she been for sale at a fair price?

Cross-interrogatory No. 4:

If you say there was such a market in Seattle, was the demand active enough to induce competitive bidding?

Cross-interrogatory No. 5:

If you say that there was such a market in Seattle, give instances of sales that have taken place in such market, naming the date, the vessel, her size and type, and the price for which she was sold.

Cross-interrogatory No. 6:

If in answer to the preceding, you give instances of sales, state if you know whether such sales were forced or not, and the source of your information regarding them.

Cross-interrogatory No. 7:

If in answer to Interrogatory No. 7, you state what in your opinion was the fair reasonable market value of the "Telegraph," state fully your reasons for that opinion, and the comparative sales, if any, upon which such opinion is based.

Cross-interrogatory No. 8:

If in answer to Interrogatory No. 5, you name any waters to which the "Telegraph" could have been taken, state whether or not there was a demand for a vessel of her type in such waters, or whether suffi-

cient vessels to care for the traffic in such waters were already in operation.

Cross-interrogatory No. 9:

If in answer to Interrogatory No. 10 you [319] state that a passenger vessel built for speed is not economical to operate, does it follow that for that reason her earning power will be less than a more economical, but slower, vessel?

Cross-interrogatory No. 10:

To intelligently answer Interrogatories Nos. 9 and 10, would it, or would it not be, necessary to have an accurate knowledge of the state of the freight and passenger traffic in the places mentioned as well as a knowledge of competition from other boats, railroads or interurban lines?

IRA BRONSON,  
Proctor for Libelant. [320]

[**Deposition of C. W. Cook for Claimant.**]

Direct Interrogatories propounded to C. W. COOK, a witness on behalf of claimant, pursuant to the annexed Stipulation:,

Interrogatory No. 1: State your name, age, place of residence and occupation.

Answer: C. W. Cook. 50 years. San Rafael, California. Pacific Coast Manager American-Hawaiian Steamship Company.

Interrogatory No. 2: If, in answer to the last interrogatory you state that you are engaged in the business of transportation and shipping by water, state how long you have been so engaged in such business and in what capacities.

Answer: Manager of Vancouver Line and in gen-

eral shipping business at Seattle from 1898 to 1906, inclusive. Pacific Coast Manager of American-Hawaiian Steamship Company, with headquarters at San Francisco, from January, 1901, to date.

Interrogatory No. 3: Were you ever engaged in such business at Seattle, Washington, and if so, when and how long, with what company, corporation, firm or person were you associated in such business at Seattle, and in what capacity and capacities?

Answer: Manager of Vancouver Line, and in general shipping business from 1898 to 1906, inclusive.

Interrogatory No. 4: Were you familiar with the stern-wheel Steamer "Telegraph," formerly operated on the Seattle-Everett Line, and sold in the year 1909 to the Inland Navigation Company, Libellant herein, prior to the time she was sunk in Elliott Bay at Seattle, Washington, April 25, 1912?

(SEAL) [321]

Answer: Never made a minute examination, but have seen her and in a general way knew her.

Interrogatory No. 5: State, if you know, whether or not the "Telegraph" could have been taken to any other waters than Puget Sound, and if so, to what waters, and what, if any use, could have been made of said vessel upon the waters of Puget Sound and adjacent waters, or any other waters to which she could have been taken.

Answer: "Telephone" similar, but somewhat larger boat, taken from Columbia River to San Francisco. "Ocean Wave" taken from Puget Sound to San Francisco. "Hassalo," "Emma Haywood," "Bailey Gatzert," "Multnomah," etc., have been

successfully taken between Puget Sound and Columbia River and I believe "Telegraph" could have been taken to Columbia River, certainly, and perhaps to San Francisco. Said vessel could have been used in the passenger business.

Interrogatory No. 6: State, if you know, whether or not there was any market at Seattle, Washington, at the time the "Telegraph" was sunk, for the "Telegraph" and for vessels of her kind and type.

Answer: At the time she was sunk I had not lived in Seattle for five years, but through the American-Hawaiian Steamship Company business at Puget Sound have kept in touch with conditions relating to local boats as connecting lines. When I left Seattle in December, 1906, steamboat owners were going in for the more modern screw boats, and to the best of my belief there was then little demand for boats of the "Telegraph" class.

Interrogatory No. 7: If you say there was such a market at Seattle, Washington, at said time, for such  
(SEAL)

vessel, what, [322] this Interrogatory, you will consider such value as the price which in your opinion, said vessel would bring in said market if offered for sale by one who desired but was not obliged to sell, and was bought by one who was under no necessity of having it. You will also take into consideration all the capabilities of the vessel and all the uses to which it could be put, either at Seattle or elsewhere where said vessel could be taken and used.

Answer: The price of the "Ocean Wave" was \$10,000. The price of "North Pacific," an older and

slower, though better boat, was \$10,000 in 1898. The price currently stated, and not so far as I ever heard disputed, at which the "State of Washington" was sold in 1906 was \$12,000. I consider the reasonable market value of the "Telegraph" was \$20,000.

Interrogatory No. 8: There is testimony in this case to the effect that the "Telegraph" was the fastest stern-wheel steamer ever constructed. State, if you know, whether or not this testimony is correct.

Answer: Do not know, but my impression is she was not as fast as the "Telephone" and no faster than "Bailey Gatzert."

Interrogatory No. 9: It appeared in this case that the "Telegraph" was built principally for speed and for carrying passengers. State, if you know, whether or not such a vessel would be an economical vessel to operate.

Answer: Not so considered.

Interrogatory No. 10: State, if you know, if such a vessel would have as great earning capacity in the waters in which the "Telegraph" could be taken or

(SEAL)

used, as a similar [323] vessel of equal cost of construction and the same state of repair and condition, but with less speed and constructed also for carrying freight.

Answer: On a short run like Bremerton, or any passenger point without quicker rail or water competition. She would do better with speed and without freight. On a long run to or from sparsely settled or small towns, freight and passenger boat

would do better.

Interrogatory No. 11: State, if you know, whether or not such a vessel would have as great a market value at said time and place as a simliar vessel of equal cost of construction and the same state of repair and condition, but constructed also for carrying freight.

Answer: As the large towns producing passenger traffic are served by better boats than the "Telegraph" and are also served by rail lines, it is my opinion that a general purpose freight and passenger boat would have greater value.

Interrogatory No. 12: State any facts within your knowledge which will tend to show the fair, reasonable market value of the "Telegraph" at the time and place she was sunk.

Answer: "Ocean Wave" was built in 1891 and cost, so her builders told me, \$105,000. I sold her in 1899 for \$10,000. "State of Washington," built in 1889, was sold in 1906 for a sum said to be \$12,000. "Telegraph," built in 1903 at a cost, I should judge, of \$65,000 to \$75,000, must have deteriorated considerably in nine years. Her most suitable runs, namely, Seattle-Tacoma or Seattle-Everett, were covered by superior boats, as the "Flyer" and "Indianapolis," and were paralleled by electric and [324] steam railroads. Her chief value was as a spare boat.

(SEAL)

#### **Cross-interrogatories Propounded to C. W. Cook.**

Cross-interrogatory No. 1. If in answer to Interrogatory No. 6 you state that there was a market in

Seattle at the time the "Telegraph" was sunk for vessels of her type, state whether or not the bidders in such market would be confined to persons and firms wishing her for passenger traffic.

Answer: Yes.

Cross-interrogatory No. 2. Do you know of any possible passenger route on Puget Sound where the "Telegraph" could be used which is not already served by an established passenger line?

Answer: No.

Cross-interrogatory No. 3. Do you know of any established line operating on Puget Sound which would have desired to purchase the "Telegraph" on or about April 25, 1912, had she been for sale at a fair price?

Answer: No.

Cross-interrogatory No. 4. If you say there was such a market in Seattle, was the demand active enough to induce competitive bidding?

No answer:

Cross-interrogatory No. 5. If you say that there was such a market in Seattle, give instances of sales that have taken place in such market, naming the date, the vessel, her size and type, and the price for which she was sold.

No answer.

Cross-interrogatory No. 6. If in answer to the preceding, you give instances of sales, state if you know whether such sales were [325] forced or not, and the source of your information regarding them.

Answer: Sales previously mentioned by me were

not forced sales.

Cross-interrogatory No. 7. If in answer to Interrogatory No. 7, you state what in your opinion was the fair, reasonable market value of the "Telegraph," state fully your reasons for that opinion, and the comparative sales, if any, upon which such opinion is based.

Answer: The "Telegraph" was built in 1903 for carrying passengers between Everett and Seattle, where there was then no very strong competition. Since that time an electric railway has been completed between these two cities and any other run for which the "Telegraph" was suited has been covered by more modern steamers. In addition to sales already mentioned, the Western Pacific Railroad needed a ferryboat and in July, 1909, bought on the Columbia River the Steamer "Telephone," a larger and better, but very similar class of boat as the "Telegraph," for \$24,500.

Cross-interrogatory No. 8. If in answer to Interrogatory No. 5, you name any waters to which the "Telegraph" could have been taken, state whether or not there was a demand for a vessel of her type in such waters, or whether sufficient vessels to care for the traffic in such waters were already in operation.

Answer: There is no demand at San Francisco and I do not believe any demand on the Columbia River or the Willamette River for the "Telegraph."

Cross-interrogatory No. 9. If in answer to Interrogatory No. 10 you state that a passenger vessel built for speed is not economical to operate, does it

follow that for that reason her earning power will be less than a more economical, but slower, vessel?  
[326]

Answer: Given a passenger traffic of remunerative volume and at remunerative rates, a fast vessel's earnings will be greater than earnings of a slow one, provided passengers are equally treated on both boats and schedule is maintained.

Cross-interrogatory No. 10. To intelligently answer Interrogatories Nos. 9 and 10, would it, or would it not be, necessary to have an accurate knowledge of the state of the freight and passenger traffic in the places mentioned as well as a knowledge of competition from other boats, railroads or interurban lines?

(SEAL)

Answer: Not necessarily an accurate knowledge, but a good general understanding of conditions is necessary.

[SEAL]

C. W. COOK.

Subscribed and sworn to before me this 23d day of January, 1913.

JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

My commission will expire December 4th, 1915.  
[327]

**[Certificate of Notary Public to Deposition of C. W. Cook.]**

State of California,  
County of San Fransico,—ss.

I, James Mason, a notary public, in and for the

said County of San Francisco, State of California, an officer duly authorized to administer oaths in said County and State, DO HEREBY CERTIFY that the above and foregoing deposition of C. W. COOK was taken before me at my office, No. 430 California Street, in the City of San Francisco, California, the 23d day of January 1913, in pursuance of the Stipulation hereto annexed; that before the said deposition was so taken, the said witness was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in said cause; that thereupon I propounded to said witness the annexed and foregoing direct and Cross-interrogatories to be propounded to said witness, and thereupon the answers of said witness to the said Interrogatories and Cross-interrogatories so propounded to him, were by me reduced to writing; that thereafter the said answers of said witness to such Interrogatories and Cross-interrogatories were carefully read by said witness and then subscribed by him in my presence; and I DO FURTHER CERTIFY that I am not counsel nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal this 23d day of January, 1913.

[Seal]

JAMES MASON,

Notary Public in and for the State of California,  
Residing at San Francisco.

My Commission will expire December 4th, 1915.

Approved as to form:

IRA BRONSON,  
Proctor for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Respondent and Claimant.

Postage .....	.10
Fees—Administering Oath .....	.50
18 Folios Testimony at 30c.....	5.40
Certificate .....	1.00
	—
	7.00

[328]

[Indorsed]: Stipulation to Take Deposition of C. W. Cook and Interrogatories to be Propounded to C. W. Cook, and Deposition, Interrogatories and Cross-interrogatories, etc. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 30, 1913. Frank L. Crosby, Clerk. By ———, Deputy.

[329]

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*In the United States District Court, for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Stipulation to Take Depositions [of Barney DeJon  
et al.]**

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause, through their respective proctors herein, that the depositions of BARNEY DEJON, JOSEPH SUPPLE and MARCUS TALBOTT, witnesses in behalf of claimant herein, who now reside at the city of Portland, State of Oregon, and more than one hundred miles from the place of trial of the said cause, and who will not be present at the trial of said cause, may be taken in said city of Portland, State of Oregon, before J. P. HANNON, Notary Public, at the said city of Portland in said State, at the office of said Notary Public at No. 510 Wells-Fargo Building in said city, at such time as may be convenient for said notary and said witnesses, said depositions to be taken and returned with all convenient speed.

Said depositions shall be taken upon the Interrogatories and Cross-interrogatories hereto attached, and all formalities attending the taking of said depositions are hereby waived by the said parties, excepting that all objections to materiality, competency and relevancy of the Interrogatories and the testimony taken thereunder may be raised by either party at the time of the trial. Said [330] witnesses shall be duly sworn by the said Notary Public and their answers to the Interrogatories and Cross-

interrogatories shall be reduced to writing or typewriting and signed by them, after which said depositions shall be returned to the Clerk of the above-named court by said Notary Public with his certificate as to the taking of the same, and said depositions may be read in evidence at the trial by either party with the same effect as if said witnesses were personally present and testifying therein.

Dated January 15th, 1913.

IRA BRONSON,

Proctor for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Respondent and Claimant. [331]

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*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Direct Interrogatories to be Propounded to Barney  
DeJon.**

Direct Interrogatories to be propounded to Barney

DeJON, a witness on behalf of Claimant, pursuant to the annexed Stipulation:

**Interrogatory No. 1:**

State your name, age, place of residence and occupation.

**Interrogatory No. 2:**

If in answer to the last Interrogatory you state that you are a marine engineer, state how long you have been engaged in that occupation.

**Interrogatory No. 3:**

Were you ever Chief Engineer of the steamship "Telegraph" formerly operated on the Seattle-Everett run, State of Washington, and sold to the Inland Navigation Company, Libelant herein.

**Interrogatory No. 4:**

If you answer the last Interrogatory in the affirmative, state when you were such engineer, and how long you continued as such engineer of the "Telegraph," and in what waters she was run while you acted as such engineer. [332]

**Interrogatory No. 5:**

If you were such engineer of the "Telegraph," did you at any time or times run said vessel at her full speed, and if so, state in what waters and under what conditions she was so operated.

**Interrogatory No. 6.**

If you ever did run said vessel at her full speed, state what in your opinion, was the maximum speed at which the "Telegraph" could be run.

**Interrogatory No. 7:**

There is testimony in this case that the "Telegraph" was capable of running at a speed of 20 miles

per hour. State whether or not, in your opinion, the "Telegraph" could run 20 miles per hour, and if not, what, in your opinion, was her maximum speed.

Interrogatory No. 8:

It has been testified in this case that the "Telegraph" was the fastest stern-wheel steamer ever constructed. State, if you know, whether or not this is correct, and if not, what other stern-wheel steamer you know of that was capable of running faster than the "Telegraph."

Interrogatory No. 9:

If in answer to the last Interrogatory you have give the name of any stern-wheel steamer which could run faster than the "Telegraph," state how you know such fact.

Interrogatory No. 10:

Was anything ever done to the hull of the "Telegraph," to your knowledge, which would in any way decrease her speed, and if so, state fully what it was and how such fact would decrease her speed. [333]

Interrogatory No. 11:

It has been testified in this case that the "Telegraph" was built principally for speed and for carrying passengers. State, if you know, whether or not such a vessel would have as great an earning capacity as another similar vessel of equal cost of construction and in the same repair and condition, but with less speed and constructed with a greater freight carrying capacity.

Interrogatory No. 12:

Have you at any time attempted to find a purchaser for the "Telegraph"?

**Interrogatory No. 13:**

State, if you know, whether or not at the time and place the "Telegraph" was sunk in Elliott Bay in April, 1912, there was a market for said vessel and other vessels of her kind and type.

**Interrogatory No. 14:**

Have you ever known of vessels of the kind and type of the "Telegraph" being bought or sold at Seattle, Washington, or in the waters to which the "Telegraph" could be taken and in which she could be used?

**Interrogatory No. 15:**

If in answer to any of the foregoing Interrogatories you state that you took the "Telegraph" from Puget Sound to the Columbia River, state whether or not she made said trip under her own speed or in tow.

**Interrogatory No. 16:**

State whether or not the "Telegraph" was so constructed that she could be taken to the inland waters of Alaska, or to San Francisco, or to any other waters where she could be used other than Puget Sound and adjacent waters.

BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Respondent and Claimant. [334]

**Cross-interrogatories to be Propounded to Barney DeJon.****Cross-interrogatory No. 1:**

What experience have you had on the "Telegraph" since she came to Puget Sound Waters?

**Cross-interrogatory No. 2:**

If you say that there was such a market, was the

demand therein sufficient to induce competitive bidding?

Cross-interrogatory No. 3:

If in answer to Interrogatory No. 13 you state that there was a market for the "Telegraph," give the particulars of other sales in said market?

Cross-interrogatory No. 4:

Name if you can *to do* any person or firm whom you know desired to buy the "Telegraph" or a vessel of her size and type?

Cross-interrogatory No. 5:

If in answer to Interrogatory No. 8 you name a faster stern-wheel steamer than the "Telegraph," what was her size and how did you test her speed?

IRA BRONSON,

Proctor for Libelant. [335]

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*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Direct Interrogatories to be Propounded to Joseph Supple.**

Direct interrogatories to be propounded to JOSEPH SUPPLE, a witness on behalf of claimant, pursuant to the annexed stipulation:

**Interrogatory No. 1:**

State your name, age, place of residence and occupation.

**Interrogatory No. 2:**

How long have you been engaged in said occupation?

**Interrogatory No. 3:**

Were you familiar with the stern-wheel steamer "Telegraph," formerly operated on the Seattle-Everett run, Washington, and on the Portland-Astoria run, Oregon, which was sunk in Elliott Bay in April, 1912?

**Interrogatory No. 4:**

State whether or not said vessel, if you say you were familiar with her, could be taken from Puget Sound to any other waters where she could be used, and if so, to what waters. [336]

**Interrogatory No. 5:**

State, if you know, whether or not there was at the time and place the "Telegraph" was sunk a market for said vessel and vessels of her kind and type.

**Interrogatory No. 6:**

If you say there was such a market at said time and place, state what, in your opinion, was the fair, reasonable market value of said vessel at said time and place. In answering this Interrogatory, you will consider such value as the price which, in your opin-

ion, said vessel would bring in said market if offered for sale by one who desired but was not obliged to sell, and was brought by one who was under no necessity of having it. You will also take into consideration all the capabilities of the vessel and all the uses to which it could be put, either at Seattle or elsewhere where said vessel could be taken and used.

**Interrogatory No. 7:**

It has been testified in this case that the "Telegraph" was the fastest stern-wheel steamer ever constructed. State, if you know, whether or not this is correct, and if not correct, what other stern-wheel steamer was capable of making greater time than the "Telegraph."

**Interrogatory No. 8:**

It has been testified in this case that the "Telegraph" was constructed principally for speed and carrying passengers. State, if you know, whether or not such a vessel would have as great earning capacity in the waters to which the "Telegraph" could be taken, and upon which she could be used, as a similar vessel of equal cost of construction and in the same condition and state of repair, but of greater freight carrying capacity.

**Interrogatory No. 9:**

Would such a vessel as the "Telegraph," in your opinion, [337] have as great a market value at the time and place she was sunk, as a vessel of the same kind and type and of equal cost of construction, and in the same condition and state of repair, but with less speed, and with greater freight carrying capacity.

**Interrogatory No. 10:**

State any fact or facts within your knowledge which would tend to show the fair, reasonable market value of the "Telegraph" at the time and place she was sunk.

**BOGLE, GRAVES, MERRITT & BOGLE,**  
Proctors for Respondent and Claimant. [338]

**Cross-interrogatories to be Propounded to Joseph Supple.**

**Cross-interrogatory No. 1:**

If in answer to Interrogatory No. 5 you state that there was a market in Seattle at the time the "Telegraph" was sunk for vessels of her type, state whether or not the bidders in such market would be confined to persons and firms wishing her for passenger traffic.

**Cross-interrogatory No. 2:**

If you say there was such a market in Seattle, was the demand active enough to induce competitive bidding?

**Cross-interrogatory No. 3:**

If you say that there was such a market in Seattle, give instances of sales that have taken place in such market, naming the date, the vessel, her size and type, and the price for which she was sold.

**Cross-interrogatory No. 4:**

If in answer to the preceding you give instances of sales, state if you know whether such sales were forced or not, and the source of your information regarding them.

**Cross-interrogatory No. 5:**

If in answer to Interrogatory No. 6 you state what

in your opinion was the fair reasonable market value of the "Telegraph," state fully your reasons for that opinion, and the comparative sales, if any, upon which such opinion is based.

Cross-interrogatory No. 6:

If in answer to Interrogatory No. 4 you name any waters to which the "Telegraph" could have been taken, state whether or not there was a demand for a vessel of her type in such waters, or whether sufficient vessels to care for the traffic in such waters were already in operation?

Cross-interrogatory No. 7:

To intelligently answer Interrogatories Nos. 4 and 9, would it or would it not be necessary to have an accurate knowledge of the state of the freight and passenger traffic in the places mentioned as well as a knowledge of competition from other boats, railroads or interurban lines?

Cross-interrogatory No. 8:

IRA BRONSON.

Proctor for Libelant. [339]

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*In the United States District Court, for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Direct Interrogatories to be Propounded to Marcus Talbott.**

Direct interrogatories to be propounded to MARCUS TALBOTT, a witness on behalf of claimant, pursuant to the annexed stipulation:

**Interrogatory No. 1:**

State your name, age, residence and occupation.

**Interrogatory No. 2:**

Have you ever been engaged in or connected with the business of shipping and transportation by water, and if so, state fully the time, place and extent to which you have been so engaged.

**Interrogatory No. 3:**

Were you engaged in such business at Seattle, Washington, at any time, and if so, when, how long and with what company or person were you associated or connected?

**Interrogatory No. 4:**

Were you familiar with the stern-wheel steamer "Telegraph," formerly operated upon the Seattle-Everett run, Washington, and also operated upon the Portland-Astoria run, Oregon, and if so, state fully how long you had known said vessel. [340]

**Interrogatory No. 5:**

Have you ever bought or sold stern-wheel vessels at Seattle, Washington, or at any place where the "Telegraph" could have been taken and used?

**Interrogatory No. 6:**

Have you known of stern-wheel vessels being

bought or sold at Seattle, Washington, or at any place where the steamer "Telegraph" could have been taken and used?

Interrogatory No. 7:

State, if you know, whether or not there was in April, 1912, at the time the steamer "Telegraph" was sunk in Elliott Bay, a market at Seattle, Washington, for said vessel and vessels of her kind and type.

Interrogatory No. 8:

State what, in your opinion, was the fair, reasonable market value of the "Telegraph" at the time and place she was so sunk. In answering this interrogatory, you will consider such value as the price which, in your opinion, said vessel would bring in said market if offered for sale by one who desired but who was not obliged to sell, and was bought by one who was under no necessity of having it. You will also take into consideration all the capabilities of the vessel and all the uses to which she could be put, either at Seattle or elsewhere where said vessel could be taken and used.

Interrogatory No. 9:

It has been testified in this case that the "Telegraph" was constructed principally for speed and carrying passengers. State, if you know, whether or not such a vessel would have as great earning capacity as a similar vessel of equal cost of construction, and in the same condition and state of repair, but with less speed, and constructed with a greater freight carrying capacity. [341]

Interrogatory No. 10:

State whether or not such a vessel would have as

great a market value at the time and place she was so sunk as a similar vessel of equal cost of construction, and in the same condition and state of repair, but with less speed and with a greater freight carrying capacity.

**Interrogatory No. 11:**

It has been testified in this case that the "Telegraph" was the fastest stern-wheel vessel ever constructed. State whether or not this is correct.

**Interrogatory No. 12:**

If you say that the "Telegraph" was not the fastest stern-wheel vessel ever constructed, state what other stern-wheel vessel was faster.

**Interrogatory No. 13:**

State, if you know, whether or not stern-wheel vessels were permitted by the United States Government officers having charge thereof, to carry the same number of passengers, in proportion to their gross tonnage, on Puget Sound, as were permitted on the inland waters adjacent to Portland, and if not, what different rule was applied at the two places.

**Interrogatory No. 14:**

State any facts within your knowledge which would tend to show the fair, reasonable market value of the "Telegraph" at the time and place she was sunk.

**BOGLE, GRAVES, MERRITT & BOGLE,**

Proctors for Claimant and Respondent. [342]

**Cross-interrogatories to be Propounded to Marcus Talbott.**

**Cross-interrogatory No. 1:**

If in answer to Interrogatory No. 7 you state that there was a market in Seattle at the time the "Tele-

graph" was sunk for vessels of her type, state whether or not the bidders in such market would be confined to persons and firms wishing her for passenger traffic?

Cross-interrogatory No. 2:

Do you know of any possible passenger route on Puget Sound where the "Telegraph" could be used which is not already served by an established passenger line?

Cross-interrogatory No. 3:

Do you know of any established line operating on Puget Sound which would have desired to purchase the "Telegraph" on or about April 25th, 1912, had she been for sale at a fair price?

Cross-interrogatory No. 4:

If you say there was such a market in Seattle, was the demand active enough to induce competitive bidding?

Cross-interrogatory No. 5:

If you say that there was such a market in Seattle, give instances of sales that have taken place in such market, naming the date, the vessel, her size and type, and the price for which she was sold?

Cross-interrogatory No. 6:

If in answer to the preceding, you give instances of sales, state if you know whether such sales were forced or not, and the source of your information regarding them?

Cross-interrogatory No. 7:

If in answer to Interrogatory No. 8 you state what in your opinion was the fair reasonable market value of the "Telegraph," state fully your reasons for that

opinion, and the comparative sales, if any, upon which such opinion is based.

Cross-interrogatory No. 8:

If in answer to Interrogatories Nos. 11 and 12 you say that there was a faster stern-wheel steamer than the "Telegraph," give the source of your information.

Cross-interrogatory No. 9:

If in answer to Interrogatory No. 13 you state that stern-wheelers are permitted to carry relatively more passengers on inland waters adjacent to Portland, than on [343] Puget Sound, state whether or not there is at present a demand for passenger vessels on the inland waters adjacent to Portland.

IRA BRONSON.

Proctor for Libelant. [344]

[Certificate of Notary Public to Depositions of Barney Dionne et al.]

State of Oregon,

County of Multnomah,—ss.

I, John P. Hannon, a notary public in and for the said County of Multnomah, State of Oregon, an officer duly authorized to administer oaths in said county and State, do hereby certify that the above

Dionne

and foregoing depositions of Barney Dejon, Joseph Supple and Marcus Talbott were taken before me at No. 510 Wells-Fargo Building, in the City of Portland, Oregon, the 27th day of January, 1913, in pursuance of the Stipulation hereto annexed; that before the said depositions were so taken, the said witnesses were by me each first duly sworn to testify

the truth, the whole truth and nothing but the truth in said cause; that thereupon, I propounded to said witnesses the annexed and foregoing direct and cross interrogatories to be propounded to said witnesses, and thereupon the answers of said witnesses to said Interrogatories and Cross-interrogatories so propounded to them, were by Estelle Macaulay reduced to writing; that thereafter the said answers of said witnesses to such Interrogatories and Cross-interrogatories were carefully read by said witnesses and then subscribed by them in my presence; and I do not further certify that I am not counsel nor attorney for any of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal this 27th day of January, 1913.

[Seal] JOHN P. HANNON.

Notary Public in and for the State of Oregon, Residing at Portland:

Approved as to form:

## IRA BRONSON,

Proctor for Libelant.

# BOGLE, GRAVES, MERRITT & BOGLE,

## Proctors for Respondent and Claimant. [345]

[Endorsed]: Stipulation to Take Depositions and  
Interrogatories to be Propounded to Barney Dejon,  
Joseph Supple and Marcus Talbott. [346]

**[Answers of Marcus Talbot, for Claimant, to Direct  
and Cross Interrogatories.]***In the United States District Court for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

**INLAND NAVIGATION COMPANY, a Corpora-  
tion,**

Libellant,

vs.

**Steamship “ALAMEDA,” Her Engines, Boilers,  
Apparel, Tackle and Furniture,**

Respondent.

**ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,**

Claimant.

MARCUS TALBOT, a witness for claimant herein, produced as such witness pursuant to the annexed stipulation, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, makes answer to the several direct and cross interrogatories attached to said stipulation as follows:

Answering direct interrogatory No. 1, the witness says: “My name is Marcus Talbott; I am 49 years of age; I reside at 417 East Fifteenth Street North, Portland, Oregon; I am now General Manager for the Port of Portland Commission.”

Answering direct interrogatory No. 2, the witness says: “Yes, I have been engaged in the business of shipping and transportation by water. I was in this business from June 1st, 1900, to July 1st, 1905, in

various capacities with the Pacific [347] Coast Steamship Company, the last position being Assistant General Agent at Seattle, Washington. I then came to Portland where I was Vice-president and General Manager of The Dalles-Portland & Astoria Navigation Company, known as the Regulator Line, until August, 1908. From August, 1908, to August, 1911, I was General Manager at Seattle of the Alaska Coast Company and the Alaska-Pacific Steamship Company. From October, 1911, I have held my present position."

Answering direct interrogatory No. 3, the witness says: "My last answer answers this question."

Answering direct interrogatory No. 4, the witness says: "Yes, I knew her both on Puget Sound and at Portland."

Answering direct interrogatory No. 5, the witness says: "Yes."

Answering direct interrogatory No. 6, the witness says: "Yes."

Answering direct interrogatory No. 7, the witness says: "Yes."

Answering direct interrogatory No. 8, the witness says: "Not to exceed \$25,000.00."

Answering direct interrogatory No. 9, the witness says: "No."

Answering direct interrogatory No. 10, the witness says: "No."

Answering direct interrogatory No. 11, the witness says: "No." [348]

Answering direct interrogatory No. 12, the witness says: "In my opinion the 'Bailey Gatzert' and the

'Telephone' were faster stern-wheel vessels than the 'Telegraph' was."

Answering direct interrogatory No. 13, the witness says: "It is my understanding that vessels of this type are allowed somewhat more passengers at Puget Sound than at Portland, in proportion to their tonnage."

Answering direct interrogatory No. 14, the witness says: "My reasons for placing a value of not to exceed \$25,000 on the 'Telegraph' are that she was built to carry passengers at a fast speed, and at the time she was sunk she was not able to carry passengers at a fast speed, and for this reason she could not have as great a value as other stern-wheel vessels of equal cost and in the same condition, but which were built for all around purposes."

Answering cross-interrogatory No. 1, the witness says: "To persons desiring her for passenger traffic and as much freight as she had accommodation for."

Answering cross-interrogatory No. 2, the witness says: "There are various routes on Puget Sound which the 'Telegraph' could serve, but which already have service of some kind, but there is nothing to prevent other vessels going on these same routes."

Answering cross-interrogatory No. 3, the witness says: "No."

Answering cross-interrogatory No. 4, the witness says: "While the market at Seattle was not active, in my judgment there would have been competitive bids." [349]

Answering cross-interrogatory No. 5, the witness says: "On account of being absent from Seattle for

over a year I have no knowledge of sales during that time. Previous to that time I know of the sale of the stern-wheel steamer 'State of Washington'; also the sale of the 'Capitol City' at Olympia, and the stern-wheel steamer 'Telephone' at Portland. The 'State of Washington' sold for \$17,000; the 'Capitol City' sold for about \$17,000 and the 'Telephone' sold for about \$24,500. Each of these vessels was much larger than the 'Telegraph,' carried more passengers and a larger amount of freight, and the 'Telephone' in my opinion was a faster boat than the 'Telegraph.'

Answering cross-interrogatory No. 6, the witness says: "These sales of the 'State of Washington' and the 'Capitol City' were not forced, and I feel confident that the sale of the 'Telephone' was not forced. It was a private sale."

Answering cross-interrogatory No. 7, the witness says: "The reasons I have given in answer to the 14th direct interrogatory, are my answer to this question."

Answering cross-interrogatory No. 8, the witness says: "For a period of from one and one-half to two years the owner of the 'Telegraph' rented space at the dock of the Regulator Line at Portland, of which I was then Vice-president and General Manager, and the 'Telegraph' and the 'Bailey Gatzert' left this dock every morning at the same time. These vessels frequently came together and showed bursts of speed which showed the 'Bailey Gatzert' to be the fastest boat, and that was generally understood along the water-front to be true. The same is true of the 'Telephone,' which the Regulator Line had chartered

for over a year, and it was generally conceded on the waterfront that she [350] was faster than the 'Telegraph.' "

Answering cross-interrogatory No. 9, the witness says: "They carried relatively less passengers on the Columbia River than on Puget Sound. There are passenger runs out of Portland, and while no vessels are being built for these runs, there would be a demand for vessels to take the place of those on these runs in case of accident to one of those vessels.

M. TALBOT.

Subscribed and sworn to before me this 27 day of January, 1913.

[Seal]

JOHN P. HANNON,  
Notary Public for Oregon. [351]

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[Answers of Barney Dionne, for Claimant, to Direct and Cross Interrogatories.]

*In the United States District Court for the Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corporation,

Libellant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers, Apparel, Tackle and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

Answers of BARNEY DIONNE, one of the witnesses named in the attached stipulation for taking depositions in above cause to the direct and cross interrogatories attached to said stipulation, but whose surname is misspelled in said stipulation and interrogatories, Dejon, instead of Dionne.

Barney Dionne, a witness for claimant herein, produced as such witness, pursuant to the annexed stipulation, being by me first duly sworn to testify the truth, the whole truth and nothing but the truth relative to said cause, made answer to the several direct and cross interrogatories attached to said stipulation as follows:

Answering direct interrogatory No. 1, the witness says: "My name is Barney Dionne; I am forty-seven years of age; I reside at 514 Jefferson Street, Portland, Oregon; I am a marine engineer."

Answering direct interrogatory No. 2, the witness says: [352] "I have been a marine engineer for twenty years."

Answering direct interrogatory No. 3, the witness says: "Yes."

Answering direct interrogatory No. 4, the witness says: "I was Chief Engineer of the steamship 'Telegraph' for about three and one-half years. I became Assistant Engineer on her in the fall of 1903; I took her as Chief Engineer in the spring of 1904, while she was on the Seattle-Everett run. The next spring we brought the 'Telegraph' to Portland and I continued Chief Engineer of her until November, 1905, during which time she ran from Portland to Astoria on the Willamette and Columbia Rivers."

Answering direct interrogatory No. 5, the witness says: "Yes, I have run the 'Telegraph' at her full speed a great many times, both on Puget Sound and on the Portland-Astoria run. I have run her full speed at different times racing other vessels. I was Chief Engineer of the 'Telegraph' on July 4th, 1904, when she raced the 'Flyer' from Seattle docks nearly to Bean Point across the Sound from Seattle. Captain Gilmore Parker was Master of the 'Telegraph' at that time. He jockeyed the 'Flyer' for position and we managed to hold our own with the 'Flyer,' but no more. I had to drive the 'Telegraph' to her uttermost at that time and all the passengers were sent forward to hold down her bow and keep her wheel up."

Answering direct interrogatory No. 6, the witness says: "Take dead water and the most favorable circumstances, the fastest the 'Telegraph' could be run, in my opinion, would be between eighteen and nineteen statute miles per hour. I have made faster time with her, but it was only when we had a favorable tide or current which made the difference. [353]

Answering direct interrogatory No. 7, the witness says: "In my opinion the 'Telegraph' never did and never could make twenty miles an hour in dead water under any circumstances. If she ever made that time it was only when she had a tide or current to help her, and make the difference. I have got out of the 'Telegraph' all of the speed she ever made, and the best she could make was between eighteen and nineteen statute miles per hour.

Answering direct interrogatory No. 8, the witness

says: "The 'Telegraph' was not the fastest stern-wheel vessel ever constructed. I know the 'Telephone' and the 'Bailey Gatzert,' both stern-wheel vessels, could run faster than the 'Telegraph,' under the same conditions."

Answering direct interrogatory No. 9, the witness says: "I know the 'Telephone' and the 'Bailey Gatzert' could run faster than the 'Telegraph' because I know they have run over the same course on the rivers as the 'Telegraph' run on and made better time on these courses than the 'Telegraph' could make. I have seen the 'Telephone' catch up with the 'Telegraph' when I was driving the 'Telegraph' at her best, showing the 'Telephone' was faster. I have been Chief Engineer of the 'Bailey Gatzert' for five years, running on the Willamette and Columbia Rivers, and I have run her over the same course as I ran the 'Telegraph,' and I have beaten the best time the 'Telegraph' could or did make."

Answering direct interrogatory No. 10, the witness says: "The stern of the 'Telegraph' was originally constructed with a bevel transom, the transom being bevelled under the wheel as shown in the following rough drawing: [354]

"When the 'Telegraph' backed the water piled up on this bevelled transom so as to set her stern down and interfere with her backing. While on the Sound, Captain Scott, the owner of the 'Telegraph' cut off about eight inches of this bevelled transom, and after she came to Portland he cut off about eighteen inches more, as shown by the cross line on the

above drawing. He also cut off about eighteen inches of her bow, as shown in the above drawing, so as to make mud landings on the rivers. Her original bow was ram-shaped, as shown by the above drawing. These changes made the 'Telegraph' slower than she was as first built. She dragged the water more after her stern was cut and the change in her bow tended to raise her bow and lower her stern, which made her slower."

Answering direct interrogatory No. 11, the witness says: "She would not, except on a strictly passenger run."

Answering direct interrogatory No. 12, the witness says: "No."

Answering direct interrogatory No. 13, the witness says: "I could not say."

Answering direct interrogatory No. 14, the witness says: "Yes, I have known of other stern-wheel vessels being bought and sold where the 'Telegraph' could be taken and used."

Answering direct interrogatory No. 15, the witness says: "Under her own steam." [355]

Answering direct interrogatory No. 16, the witness says: "She could be taken anywhere on the coast, or Alaska."

Answering cross-interrogatory No. 1, the witness says: "None, since she went back from Portland to Puget Sound."

Answering cross-interrogatory No. 2, the witness says: "I could not say."

Answering cross-interrogatory No. 3, the witness says: "I have heard of sales of a number of stern-

wheel vessels, but have no personal knowledge of them."

Answering cross-interrogatory No. 4, the witness says: "I do not know."

Answering cross-interrogatory No. 5, the witness says: "The 'Bailey Gatzert' I have testified about is a stern-wheel vessel of 642 gross tons, 195 feet long, about 32 foot beam and eight foot depth, with 1850 horse-power. I have tested her speed repeatedly by running her either alone or racing at her full speed. I know she could make better speed than the 'Telegraph' could. I have run both vessels so often at full speed under similar conditions that I know the 'Bailey Gatzert' could and can make from one and one-half to two miles an hour better than the 'Telegraph' could make, besides carrying more passengers and freight than the 'Telegraph' could.

BARNEY DIONNE.

Subscribed and sworn to before me this 27 day of January, 1913.

[Seal]

JOHN P. HANNON,  
Notary Public for Oregon. [356]

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[Answers of Joseph Supple, for Claimant, to Direct  
and Cross Interrogatories.]

*In the United States District Court for the Western  
District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

VS.

Steamship "ALAMEDA," Her Engines, Boilers,  
Apparel, Tackle and Furniture,  
Respondent.

# ALASKA STEAMSHIP COMPANY, a Corpora- tion.

**Claimant.**

**JOSEPH SUPPLE**, a witness for claimant herein, produced as such witness, pursuant to the annexed stipulation, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause, makes answer to the several direct and cross interrogatories attached to said stipulation as follows:

Answering direct interrogatory No. 1, the witness says: "My name is Joseph Supple; I am 59 years of age; I reside at 331 Sixth street, Portland, Oregon; I am a shipbuilder at Portland, Oregon."

Answering direct interrogatory No. 2, the witness says: "I have been in the shipbuilding business all my life, and in that business in Portland for twenty-five years."

Answering direct interrogatory No. 3, the witness says: "Yes." [357]

Answering direct interrogatory No. 4, the witness says: "Yes; she could be taken anywhere on the Pacific Coast or to Alaska."

Answering direct interrogatory No. 5, the witness says: "There was, at the time and place the 'Telegraph' sunk, a market for stern-wheel vessels of normal, practical type, that could be used for towboats or freight boats or passenger boats, or all combined. There was then a ready sale at fair prices for such

boats. The 'Telegraph' was a peculiar type of boat, built only for passengers and not fit for towing or carrying freight. The demand for her would be best for a strictly passenger run. In my opinion, if she had been offered for sale before she was sunk she could have been sold at some price, but not for as much in proportion to her cost as a stern-wheel boat of more practical type."

Answering direct interrogatory No. 6, the witness says: "Because of her peculiar type it is difficult for me to say what her market value would be."

Answering direct interrogatory No. 7, the witness says: "I could not answer from my own knowledge."

Answering direct interrogatory No. 8, the witness says: "In my opinion, a general, all-round, stern-wheel vessel would have a greater earning capacity."

Answering direct interrogatory No. 9, the witness says: "In my opinion, the normal type of stern-wheel vessel would have a greater market value than one like the 'Telegraph.' "

Answering direct interrogatory No. 10, the witness says: [358] "I have built at least fifty stern-wheel vessels, but the 'Telegraph' was a different type than any I have built. She was built for speed and passengers. She was not a practical vessel for the river runs. If she had been a more practical type of stern-wheel vessel, in my opinion she would have had a much greater value. I could build as good a boat as the 'Telegraph' was when new for \$55,000, although my bid was for \$72,000, but I included in that bid about \$20,000 on account of the twenty-mile guaranty required."

Answering cross-interrogatory No. 1, the witness says: "No."

Answering cross-interrogatory No. 2, the witness says: "Yes, at some price."

Answering cross-interrogatory No. 3, the witness says: "I cannot give instances of sales at Seattle, but a large number of stern-wheel vessels have been bought and sold at Portland, where there was always a market for such vessels."

Answering cross-interrogatory No. 4, the witness says: "The sales at Portland were not forced."

Answering cross-interrogatory No. 5, the witness says: "I did not give her market value."

Answering cross-interrogatory No. 6, the witness says: "Stern-wheel vessels are being bought and sold all the time and new ones are being constructed on the coast."

Answering cross-interrogatory No. 7, the witness says: "Yes."

JOSEPH SUPPLE. [359]

Subscribed and sworn to before me this 27 day of January, 1913.

[Seal]

JOHN P. HANNON,

Notary Public for Oregon. [360]

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington. Jan. 30, 1913. Frank L. Crosby, Clerk. E. M. L., Deputy. [361]

[Memorandum Decision.]

*United States District Court, Western District of Washington, Northern Division.*

No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,  
Respondent.

Filed \_\_\_\_\_.

IRA BRONSON, for Libelant.

BOGLE, GRAVES, MERRITT & BOGLE, for  
Claimant.

BY THE COURT:

On the night of April 25, 1912, while the steamer "Telegraph" was lying at her berth, in good safety on the north side of the Colman dock, in the city of Seattle, King County, Washington, the steamer "Alameda," through the gross negligence of the crew of her engine-room, and in direct violation of the orders of her master, while said steamship was being navigated from the east waterway in such city, to a berth alongside of Pier 2 in such city, was driven at great speed head on against the south side of the Colman dock and completely through such dock, and the stem of the "Alameda" was driven into the side of the hull of the steamship "Telegraph" crushing in the same and opening a large hole therein, as a

result of which the "Telegraph" immediately filled and sunk in the waters of Elliott Bay and thereby became a total loss.

The sole question submitted to the Court on final hearing was the value of the "Telegraph" at the time in question. [362]

The parties are in hopeless conflict as to the controlling principles to be applied in determining the value of the "Telegraph" and as to the amount to be awarded herein.

This statement of the position of the parties is subject to this qualification: The libelant concedes that if a market value in its fair legal acceptation is, or could be shown, it would be the duty of the Court to follow the same. Libelant contends that there was at the time in question no market for ships of the class of the "Telegraph" and that none has been shown; and it further contends that the evidence conclusively shows that no market existed for such a ship or for any ships on Puget Sound at the time. It is libelant's contention that a market is a place where things are bought and sold. That a market value is the price which a man who is willing to sell will accept, and that a man who is willing to buy will pay. That that price cannot be established or shown save and except when men are shown to be in some degree of frequency engaged in buying and selling.

The respondent contends that there was such a market value for the "Telegraph" at the time and that the same has been established by the evidence and should control in this case.

The libelant further contends that the "Tele-

graph" was in a class by herself, even among stern-wheel vessels, and that no market value being shown to have existed for her or vessels of her class at the time, that the only measure of damages which is at all compatible with justice and reason is to be arrived at by starting with the original cost of the "Telegraph" and allowing for the difference of her upkeep, the natural, fair depreciation of her hull, engines and house, and the cost of replacing her at the time of the collision, taking into account the difference between her then natural depreciated value and the cost of such new vessel. [363]

The respondent further contends that in the event the Court should find no market value to have existed, that the libelant has failed to show the value of the use of the "Telegraph" to it, and that the use value is the one which controls in the absence of the market value, and further, that since the evidence shows that there were routes available to a boat of the class of the "Telegraph" and that a purchase could have been obtained at some price, the price so obtainable in view of the uses to which a steamer of its class could be put, is the market value and the one to control herein.

The position of the Court is rendered extremely difficult in view of the diverse views of the parties both as to the law and the evidence. Notwithstanding this difficulty, the duty is nevertheless imposed upon the Court to determine this controversy, doing substantial justice between the parties in so far as the same can be accomplished.

The libelant introduced in evidence the bids of

seven reputable concerns for a duplication of the steamer "Telegraph." These bids varied from \$92,400 to \$72,500. The parties submitting these bids did not testify in the cause and no opportunity was afforded the respondent for cross-examination further than at least as to several of them the party who made the estimate upon which the bid was based, did testify and, speaking generally, it appears therefrom that their knowledge of the character of the "Telegraph" was based upon inspection made after the accident and after the boat was raised from the waters of Elliott Bay, but made with the view of submitting the bid thereafter submitted by their firm, and was further supplemented by their having on several occasions seen the "Telegraph" and ridden on her as passengers. This testimony was objected to by the respondent and its exceptions thereto preserved throughout the record. It is further contended by the respondent that the bids were influenced in amount by the requirement that the new boat constructed thereunder should make twenty miles per hour. [364]

It is difficult to say just how far, if at all, the bids in question have influenced the Court in this decision. The fact that reputable concerns would offer to duplicate the "Telegraph" for the amount of their bids must have some weight with the Court, since in order that the new boat might be a duplicate of the "Telegraph" for the amount of the bid, the Court taking into consideration the standing of the bidders, must presume that they were conversant, at least in a general way, with the character and specifications

of the "Telegraph."

The respondent, on the other hand, earnestly contends that the bids were not made in good faith, but the Court is unable to find any evidence to support this assumption. The principal objection of the respondent to this method of ascertaining value is that the parties who made the estimates were not sufficiently familiar with the "Telegraph" to draw up plans and specifications that would reproduce a duplicate of her. The respondent introduced several witnesses, and the depositions of others, for the purpose of establishing that at the time in question the "Telegraph" did have a market value of about \$25,000.00. It must be noted, however, that the testimony of these witnesses was not based upon their experience in actual sales of vessels of the class in question, at or about the time in question, and the Court is unable to find that the knowledge of these witnesses of the character of the "Telegraph" was of any more intimate nature than that of libelant's witnesses who made the estimates for the reproduction of a duplicate of the "Telegraph."

After a careful consideration of the entire testimony the Court is of opinion that the market value rule cannot control in this case, nor do I think that the offending ship should escape the payment of a just amount that will substantially recompense the libelant for the loss of its ship merely because the libelant did not show what the ship was earning at the time and prior to the loss in question. Nor am I constrained to follow the estimates [365] made for a reproduction of a duplicate of the "Telegraph"

as a fair guide to the determination of the award to be made.

It appears from the evidence that the libelant purchased the "Telegraph" and the "City of Everett" together with the route for the sum of \$55,000.00, and respondent contends that this purchase fixed the value of the "Telegraph." It does not appear how the purchase price was apportioned between the two boats but it does appear that the "Telegraph" was insured for \$27,500.00, and the "City of Everett" for \$27,250.00. The circumstances of the purchase, however, as testified to by Mr. Scott, the seller, indicate that the boats were purchased by the libelant at much less than their going value, and I do not think that the respondent is entitled to any reduction in the damages to be awarded by reason of the good fortune of the libelant in purchasing the "Telegraph" for less than its value.

The offer of compromise made by Mr. Gibbs, namely, \$37,500.00, and the surrender of the wreck, while explained to have been made on the theory that a large demurrage charge would be claimed, and while possibly not a proper element to be considered by the Court, nevertheless must have some influence in qualifying the force of this witness' testimony as to the market value of the boat.

It seems that in view of the unsatisfactory character of the evidence as to market value, and cost of reproduction, the Court is driven back upon the proposition of original cost, allowing for the difference of her upkeep and the natural fair depreciation of her hull, engines, house and equipment. It ap-

pears from the evidence that the vessel was about nine years old at the time of her loss, that she cost at a minimum not less than \$75,000.00, that she had been maintained in good repair and had been recently, prior to the accident, thoroughly overhauled. Libelant's estimates vary as to the amount of her depreciation from not exceeding fifteen to twenty-five per cent in her hull [366] and house, with much less depreciation on her engine and boilers. Respondent's estimates of depreciation are much greater.

In view of the entire record the Court is convinced that no one, much less the Court, will be able to state with anything like mathematical accuracy the real value of the "Telegraph" at the time in question. The responsibility alone rests with the Court, and it must from all circumstances determine as nearly as may be what is right and just between the parties hereto. Difficult as this may be, and doubtless with equal dissatisfaction to each of the parties hereto, the Court finds that the value of the "Telegraph" at the time of the collision was the sum of Forty-five Thousand Dollars, for which a decree may be entered in libelant's favor, with interest and costs.

[Indorsed]: Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 1, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [367]

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

INLAND NAVIGATION COMPANY, a Corpora-  
tion,

Libelant,

vs.

Steamship "ALAMEDA," Her Engines, Boilers,  
Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY,

Claimant.

**Final Decree.**

This cause having been duly referred to a Commissioner and the testimony taken by him returned into court and argument had thereon, and the Court having after due deliberation filed its Memorandum Decision on March 1, 1913, in which the Court found and now finds that the respondent was solely at fault, and that the libelant should recover in the sum of Forty-five Thousand Dollars, with interest and costs:

Now, therefore, it is hereby ordered, adjudged and decreed that the libelant, Inland Navigation Company, have and recover from the Alaska Steamship Company, claimant herein, and from The American Surety Company of New York, surety on the stipulation filed herein for the release of respondent vessel, the said sum of Forty-five Thousand (\$45,000.00)

Dollars, with interest thereon at the rate of six per cent per annum from the 11th day of May, 1912, together with its costs to be taxed.

And it is further ordered that unless an appeal be taken from the decree within the time limited by the rules and practices of this Court, the said Alaska Steamship Company, claimant herein, and the said American Surety Company of New York, stipulators on the [368] release bond of said steamship "Alameda" given herein, do cause the engagement of their said stipulation to be performed within the time provided by law and the rules of this Court, or on the first day of jurisdiction thereafter, why execution should not issue against them, their lands, goods and chattels, for the amount of this decree, according to their said stipulation.

Ordered and decreed this 3d day of March, 1913.

CLINTON W. HOWARD,  
United States District Judge.

Approved as to form:

IRA BRONSON,  
Proctor for Libelant.  
BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Claimant.

[Indorsed]: Final Decree. Filed in the U. S. District Court, Western Dist. of Washington. Mar. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [369]

*In the United States District Court, Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship “ALAMEDA,” Her Engines,  
Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Notice of Appeal.**

To the Inland Navigation Company, a Corporation,  
Libelant herein, and to Ira Bronson, Esquire,  
Proctor for Libelant, and to Frank L. Crosby,  
Clerk of said Court:

You and each of you will please take notice that  
the Alaska Steamship Company, a Corporation,  
Claimant herein, hereby appeals from the final decree  
made and entered herein on the 3d day of March,  
1913, in favor of said libelant and against said claim-  
ant, and the stipulator for the release of said Steam-  
ship “Alameda,” etc., for the sum of Forty-five  
Thousand Dollars (\$45,000.00), with interest thereon  
at the rate of six per cent (6%) per annum from  
May 11, 1912, together with libelant’s costs taxed at  
One Hundred Sixty-eight and 24/100 Dollars (\$168.-  
24), and from each and every part of said decree, to

the United States Circuit Court of Appeals for the Ninth Circuit.

**BOGLE, GRAVES, MERRITT & BOGLE,**  
Proctors for Claimant. [370]

Due service of the foregoing notice of appeal, after the filing of the same in the office of the clerk of the above-entitled court, is hereby admitted by the proctor for libelant, this 10th day of May, 1913.

**IRA BRONSON,**  
Proctor for Libelant.

[Indorsed]: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [371]

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*In the United States District Court, Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Petition for Appeal.**

To the Honorable Judge of said Court:

The Alaska Steamship Company, a corporation,

claimant herein, respectfully shows that on or about the 11th day of May, 1912, libelant herein, exhibited its libel in the District Court of the United States for the Western District of Washington, Northern Division, sitting at Seattle, against the said steamship "Alameda," her engines, boilers, tackle, apparel and furniture, in an action civil and maritime, for damages for collision between the said steamship "Alameda" owned by this claimant and petitioner, and the steamship "Telegraph" owned by said libelant, and praying, among other things, for the relief set forth in said libel, that said steamship "Alameda" be condemned to pay the demand of said libelant and costs in said libel mentioned.

That process issued out of said Court having been served on said steamship "Alameda," the said Alaska Steamship Company, petitioner herein, as owner and claimant, did thereafter file its answer to the said libel in the said District Court, [372] in which answer claimant prayed that the amount libelant was entitled to recover on account of said collision might be determined, as by reference to said libel and answer will more fully appear.

That said cause was duly referred to the United States Commissioner to take testimony in said cause and report the same to said Court, and that said cause thereafter came on to be heard before the Honorable Clinton W. Howard, one of the Judges of said District Court, on the 10th day of February, 1913, upon the pleadings and proof taken in said cause by the respective parties. That the said Judge, on or about the 1st day of March, 1913, made and filed a memo-

randum decision on the merits in said cause, whereby it was found and decreed, among other things, that the collision mentioned in the pleadings resulted from the fault of said steamship "Alameda," owned by petitioner, and that said steamship "Telegraph" became and was a total loss as the result of said collision, and that libelant was entitled to recover against the said steamship "Alameda," and this petitioner, and the stipulator on the bond for the release of said steamship "Alameda" herein, the full value of said steamship "Telegraph," and finding and decreeing that the said value of such steamship "Telegraph" was, at the time of her said loss, the sum of Forty-five Thousand Dollars (\$45,000.00), and that a decree in favor of said libelant and against your petitioner and said stipulator on said bond herein should be entered for said sum of Forty-five Thousand Dollars (\$45,000.00), with interest and costs.

That after the making and filing of said memorandum decision, on, to wit, the 3d day of March, 1913, a final decree in said cause was made and entered herein in accordance with such memorandum decision, and thereafter the costs of said libelant herein were duly taxed and allowed at the sum of One Hundred Sixty-eight and 24/100 Dollars (\$168.24).

[373]

And this petitioner is advised and insists that said decree is erroneous inasmuch as the testimony in said cause wholly failed to show that said steamship "Telegraph," at the time of her said loss, was of said value of Forty-five Thousand Dollars (\$45,000.00), or of any value in excess of Twenty-five Thousand

Dollars (\$25,000.00), and did show affirmatively that said steamship "Telegraph" was not at said time worth any sum in excess of said sum of Twenty-five Thousand Dollars (\$25,000.00).

And this petitioner, for this and other reasons, appeals from the whole of said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that the said decree may be modified and corrected by reducing the amount awarded to said libelant as and for the value of said steamship "Telegraph," to the true value of said steamship, as shown by the testimony in said cause, not exceeding said sum of Twenty-five Thousand Dollars (\$25,000.00), or such other decree made as to the said United States Circuit Court of Appeals may seem just, and that the said appellee be condemned to pay to appellant its costs on this appeal.

And your petitioner further says that there was duly filed in this court a bond in the sum of Fifty Thousand Dollars (\$50,000.00), with good and sufficient surety for the release of said steamship "Alameda" from the said libel, which bond is still in full force and effect, and that the full amount prayed for in the libel herein on account of said loss of said "Telegraph" is the sum of Fifty Thousand Dollars (\$50,000.00), and your petitioner desires to stay the execution of said decree pending this appeal and desires this Court to fix the amount of the bond it should give on this appeal, in order to supersede the said judgment and decree.

**BOGLE, GRAVES, MERRITT & BOGLE,**  
Proctors for Claimant and Appellant. [374]

Service of the within Petition, and the receipt of a copy thereof, admitted this 10th day of May, 1913.

IRA BRONSON,

Proctor for Libelant.

[Indorsed]: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [375]

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*In the United States District Court, Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Order Allowing Appeal and Fixing Supersedeas Bond.**

This cause having come on to be heard on this 10th day of May, 1913, upon the petition of the Alaska Steamship Company, a corporation, claimant in the above-entitled cause, for an appeal from the decree of this Court made and entered on the 3d day of March, 1913, wherein and whereby it was decreed

that the value of the said steamship "Telegraph" was at the time of her said loss the sum of Forty-five Thousand Dollars (\$45,000.00), and that said libelant have judgment against the said Alaska Steamship Company and the stipulator on the bond given to release said steamship "Alameda," for said sum of Forty-five Thousand Dollars (\$45,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 11th day of May, 1912, together with its costs taxed and allowed in the sum of One Hundred Sixty-eight and 24/100 Dollars (\$168.24); and it appearing from said petition for an appeal that said decree has been duly filed with the Clerk of this Court, and the Court being fully and duly advised in the premises; and it further appearing to the Court [376] that a bond in the sum of Fifty Thousand Dollars (\$50,000.00) for the release of said steamship "Alameda" from said libel, has been duly filed in this court, and that an additional bond in the sum of \$9,750.00 Dollars (\$9,750), is sufficient to stay the execution of said decree pending this appeal:

IT IS THEREFORE ORDERED AND DECREED hereby that the said ALASKA STEAMSHIP COMPANY be, and hereby is allowed an appeal from said decree as aforesaid, and that the appeal bond to be given on said appeal be fixed at the sum of \$10,000.00 Dollars (\$10,000.00), which sum shall operate as a supersedeas in said cause.

Dated at Seattle, Washington, this May 10th, 1913.

EDWARD E. CUSHMAN,

United States District Judge.

Received within order this 10th day of May, 1913,  
and receipt of a copy thereof, admitted.

IRA BRONSON,

Proctor for Libelant.

[Indorsed]: Order Allowing Appeal and Fixing  
Supersedeas Bond. Filed in the U. S. District  
Court, Western Dist. of Washington. May 10, 1913.  
Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[377]

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*In the United States District Court, Western District  
of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a  
Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines,  
Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Assignment of Errors.**

Comes now the above-named Alaska Steamship  
Company, a corporation, claimant in the above-en-  
titled cause, and says that in the record and proceed-  
ings in said cause, and in the decree made and entered  
therein on the 3d day of March, 1913, there are  
manifest errors in the following particulars:

**I.**

That the said Court erred in finding and decreeing that the value of said steamship "Telegraph," at the time of her loss as mentioned in the pleadings herein, was the sum of Forty-five Thousand Dollars (\$45,000.00).

**II.**

That the said Court erred in finding and decreeing that the value of said steamship "Telegraph" at the time of her said loss mentioned in the pleadings, was any sum in excess of Twenty-five Thousand Dollars (\$25,000.00).

**III.**

That the said Court erred in awarding and decreeing [378] to libelant herein as and for its damage on account of the said loss of said steamship "Telegraph," and as and for her full value at the time of her said loss, the said sum of Forty-five Thousand Dollars (\$45,000.00), or any sum in excess of Twenty-five Thousand Dollars (\$25,000.0).

**IV.**

That the Court erred in finding in this cause under the testimony therein that the rule of the market value of said steamship "Telegraph" at the time of her said loss could not control in finding the amount of libelant's damage herein on account of said loss of said steamship "Telegraph."

**V.**

That said Court erred in awarding or decreeing to said libelant in this cause the said sum of Forty-five Thousand Dollars (\$45,000.00), or any sum in excess of Twenty-five Thousand Dollars (\$25,000.00).

WHEREFORE, claimant herein prays that the said decree may be reversed, modified and corrected in the particulars herein set out, and such decree entered therein as ought to have been entered by the said District Court.

BOGLE, GRAVES, MERRITT & BOGLE,  
Proctors for Claimant.

Service of the within assignment of errors, and receipt of a copy thereof admitted this — day of May, 1913.

IRA BRONSON,  
Proctor for Libelant.

[Indorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington. May 10, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [379]

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*In the United States District Court, Western District  
of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines,  
Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS. That we, ALASKA STEAMSHIP COMPANY, a corporation, as principal, and AMERICAN SURETY COMPANY OF NEW YORK, a corporation of the State of New York, duly authorized to act as surety in the State of Washington, as surety, are held and firmly bound unto the INLAND NAVIGATION COMPANY, a corporation, in the sum of Ten Thousand Dollars (\$10,000.00), lawful money of the United States, to be paid to said Inland Navigation Company, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Seattle, this 12th day of May, 1913.

WHEREAS, The said Alaska Steamship Company, a corporation, principal herein, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above-entitled court on the 3d day of March, 1913, and having filed its assignment of errors in the office [380] of the Clerk of said Court, and having filed its Petition for such appeal which was duly allowed by said Court, and a citation was duly issued in said cause on such appeal; and said Court having fixed the amount of the bond on such appeal in order to stay the execution of such decree,

NOW, THEREFORE, the condition of this obligation is such that if the above-named Alaska Steam-

ship Company, appellant in said cause, shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, and shall abide by, fulfill and perform whatever judgment and decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

ALASKA STEAMSHIP COMPANY,

By R. W. BAXTER,

Its Vice-Prest.

[Seal] AMERICAN SURETY COMPANY OF  
NEW YORK,

By S. F. RATHBUN,

Resident Assistant Secretary.

Sealed and delivered, and taken and acknowledged this 12th day of May, 1913, before me.

[Seal] F. T. MERRITT,

Notary Public in and for the State of Washington,  
Residing at Seattle.

The foregoing bond and the sufficiency of the surety thereon are on this 12th day of May, 1913, approved as an appeal and supersedeas bond by the undersigned.

EDWARD E. CUSHMAN,

United States District Judge. [381]

[Indorsed]: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 12, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [382]

*In the United States District Court, Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines,  
Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corpora-  
tion,

Claimant.

**Notice of Filing Bond on Appeal.**

To INLAND NAVIGATION COMPANY, a Libel-  
ant Herein, and to IRA BRONSON, Esquire,  
Its Proctor Herein:

You and each of you will please take notice, that on the 12th day of May, 1913, the Alaska Steamship Company, claimant in the above-entitled cause and appellant, filed a bond for costs and damages on appeal herein in the sum of Two Hundred and Fifty Dollars (\$250.00), in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, at Seattle, together with a supersedeas bond in the sum of Nine Thousand Seven Hundred and Fifty Dollars (\$9,750.00), both in one bond, pursuant to order of said Court, a copy of which bonds is herewith served upon you.

You are further notified that the name of the surety on said bonds is American Surety Company of New York.

Dated at Seattle, Washington, this 12th day of May, 1913.

BOGLE, GRAVES, MERRITT & BOGLE,

Proctors for Claimant and Appellant. [383]

Service of the foregoing notice, together with copy of bond, is hereby admitted this 12th day of May, 1913.

IRA BRONSON,

Proctor for Libelant and Appellee.

[Indorsed]: Notice of Filing Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 12, 1913. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [384]

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*In the United States District Court, Western District  
of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Citation on Appeal (Copy).**

The President of the United States to INLAND NAVIGATION COMPANY, a Corporation, Libelant Herein, and to IRA BRONSON, Esquire, Its Proctor Herein, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an appeal to the said Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the said ALASKA STEAMSHIP COMPANY, a corporation, is Appellant, and you, the said INLAND NAVIGATION COMPANY, are Appellee, then and there to show cause, if any there be, why the decree of the United States District Court for the Western District of Washington, Northern Division, in the above-entitled cause, dated March 3, 1913, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief [385] Justice of the Supreme Court of the United States of America, this 12th day of May, 1913.

[Seal]                   EDWARD E. CUSHMAN,  
Judge of the United States District Court for the  
Western District of Washington.

Due service of the within citation after the filing of the same in the office of the Clerk of the above-

entitled court is hereby admitted this 12th day of May, 1913.

IRA BRONSON,  
Proctor for Libelant and Appellee.

[Indorsed]: No. 2152. Original. In the District Court of the United States, Western District of Washington, Northern Division. In Admiralty. The Inland Navigation Company, a Corporation, Libelant, vs. The Steamship "Alameda," Her Engines, etc., Respondent. Alaska Steamship Company, a Corporation, Claimant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 12, 1913. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. Bogle, Graves, Merritt & Bogle, 610-616 Central Building, Seattle, Washington, Proctors for Claimant. [386]

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*In the United States District Court, Western District  
of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Praecipe for Apostles on Appeal.**

To the Clerk of the Above-entitled Court:

You will please prepare, certify, print and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal in the above-entitled cause, pursuant to the rules of said Circuit Court of Appeals; and please include in such apostles the following:

1. A caption exhibiting the proper style of the court and the title of the cause.
2. A statement showing the time of the commencement of the suit; the names of the parties; the several dates when the respective pleadings were filed; the time when the trial was had and the name of the Judge hearing the same; showing that said cause was referred to a Commissioner to take and report the evidence; the date of the entry of the final decree, and the date when notice [387] of appeal was filed.
3. All the pleadings, including in such pleadings the following: The libel of the Inland Navigation Company, filed May 11, 1912.

Answer to libel, filed July 1, 1912.

4. All the testimony taken in the cause and all exhibits offered in evidence, such testimony including the evidence taken before and certified by the Commissioner, and also all depositions taken and filed in said cause.

5. Memorandum decision, filed March 1, 1913.
6. The final decree made and filed March 3, 1913.
7. Notice of appeal, with admission of service

thereof, filed May 10, 1913.

8. Petition for appeal, with admission of service thereof, filed May 10, 1913.

9. Order allowing appeal and fixing supersedeas bond, with admission of service thereof, filed May 10, 1913.

10. Assignment of errors, with admission of service thereof, filed May 10, 1913.

11. Bond on appeal, filed May 12, 1913.

12. Notice of filing of bond on appeal, with admission of service thereof, filed May 12, 1913.

13. Citation on appeal, with admission of service thereof, filed May 12, 1913.

14. This praecipe, filed May 22d, 1913.

**BOGLE, GRAVES, MERRITT & BOGLE,**

Proctors for Claimant and Appellant.

[Indorsed]: Praecipe for Apostles on Appeal. Filed in the U. S. District Court, Western Dist. of Washington. May 22, 1913. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy. [388]

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**[Certificate of Clerk U. S. District Court to Apostles,  
etc.]**

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 2152.

**THE INLAND NAVIGATION COMPANY, a Cor-  
poration,**

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

United States of America,

Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 388 typewritten pages, numbered from 1 to 388, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits, depositions and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred [389] and paid in my office by or on behalf of the claimant and appellant for the preparation and certification of the typewritten record on appeal issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S., as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes; 84 folios at 20c per folio.....	\$16.80
Certificate to certified copy of type-written transcript of record....	.30
Seal to said certificate.....	.40
<hr/>	
	\$17.50

I hereby certify that the above cost for preparing and certifying record, amounting to \$17.50, has been paid to me by Messrs. Bogle, Graves, Merritt & Bogle, counsel for claimant and appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 27th day of May, 1913.

[Seal]

FRANK L. CROSBY,

Clerk. [390]

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*In the United States District Court, Western District of Washington, Northern Division.*

IN ADMIRALTY—No. 2152.

THE INLAND NAVIGATION COMPANY, a Corporation,

Libelant,

vs.

The Steamship "ALAMEDA," Her Engines, Boilers, Tackle, Apparel and Furniture,  
Respondent.

ALASKA STEAMSHIP COMPANY, a Corporation,

Claimant.

**Citation on Appeal [Original].**

The President of the United States to INLAND NAVIGATION COMPANY, a Corporation, Libelant Herein, and to IRA BRONSON, Esquire, Its Proctor Herein, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an appeal to the said Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the said Alaska Steamship Company, a corporation, is appellant, and you, the said Inland Navigation Company, are appellee, then and there to show cause, if any there be, why the decree of the United States District Court for the Western District of Washington, Northern Division, in the above-entitled cause, dated March 3, 1913, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief [391] Justice of the Su-

preme Court of the United States of America, this  
12th day of May, 1913.

[Seal]                    EDWARD E. CUSHMAN,  
Judge of the United States District Court for the  
Western District of Washington.

Due service of the within citation after the filing  
of the same in the office of the clerk of the above-  
entitled court is hereby admitted this 12th day of  
May, 1913.

                          IRA BRONSON,  
Proctor for Libelant and Appellee. [392]

[Endorsed]: No. 2152. In the District Court of  
the United States, Western District of Washington,  
Northern Division. In Admiralty. The Inland  
Navigation Company, a Corporation, Libelant, vs.  
The Steamship "Alameda," Her Engines, etc., Re-  
spondent. Alaska Steamship Company, a Corpora-  
tion, Claimant. Citation on Appeal. Filed in the  
U. S. District Court, Western Dist. of Washington.  
May 12, 1913. Frank L. Crosby, Clerk. By Ed M.  
Lakin, Deputy.

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[Endorsed]: No. 2276. United States Circuit  
Court of Appeals for the Ninth Circuit. Alaska  
Steamship Company, a Corporation, Claimant of the  
Steamship "Alameda," Her Engines, Boilers,  
Tackle, Apparel and Furniture, Appellant, vs. The  
Inland Navigation Company, a Corporation, Ap-  
pellee. Apostles on Appeal. Upon Appeal from

the United States District Court for the Western District of Washington, Northern Division.

Filed May 31, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

2

IN THE  
**United States  
Circuit Court of Appeals**  
FOR THE NINTH JUDICIAL CIRCUIT

ALASKA STEAMSHIP COMPANY, a  
Corporation, Claimant of the Steamship  
"ALAMEDA", Her Engines, Boilers,  
Tackle, Apparel and Furniture,

*Appellant,*

vs.

THE INLAND NAVIGATION COM-  
PANY, a Corporation,

*Appellee.*

No. 2276.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION.

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**Brief of Appellant**

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W. H. BOGLE,  
CARROLL B. GRAVES,  
F. T. MERRITT,  
LAWRENCE BOGLE,

*Attorneys for Appellant.*



In the  
**United States Circuit Court of Appeals**  
FOR THE NINTH JUDICIAL CIRCUIT

**ALASKA STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "ALAMEDA", Her Engines, Boilers, Tackle, Apparel and Furniture,**

*Appellant,*

vs.

**THE INLAND NAVIGATION COMPANY, a Corporation,**

*Appellee.*

No. 2276.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

**Brief for Appellant**

**STATEMENT OF THE CASE.**

This cause comes before this court on appeal from a judgment of the District Court in favor of appellee, in a suit in admiralty for recovery of damages caused by a collision between the steamship "Alameda," owned by appellant, and the steamer "Telegraph," owned by appellee, occurring at the Seattle docks on April 25th, 1912, through the negligence of the engineer of the "Alameda" in not obeying the orders of the master. The liability of the "Alameda" was admitted, so the only question be-

fore the lower court was that of the amount of damages to be awarded appellee as the value of the "Telegraph."

The principal question, therefore, to be determined on this appeal, as presented by the Assignments of Error, is the amount appellee is entitled to recover as the value of the "Telegraph." Appellant's contentions in respect thereto may be classified as follows:

### I.

That the general rule of law, applicable both in admiralty and common-law suits, is that the market value of property totally destroyed tortiously, is the measure of recovery, where the evidence shows that such property had a market value at the time of its destruction.

### II.

That the evidence in this case shows conclusively that there was a market for the "Telegraph" at the time and place of her destruction, and that her market value did not then exceed \$25,000, which would be the limit of appellee's recovery in this case, with interest and costs.

### III.

That the trial court erred in holding that the rule of market value did not apply in this case,

under the evidence in the case; and erred in finding the value of the "Telegraph" at the time of her destruction, under the evidence in the case, to be the sum of \$45,000, or any sum in excess of \$25,000.

#### IV.

Appellant will also contend that there is no evidence in the case to sustain the finding of the trial court that the value of the "Telegraph" was \$45,000; and no competent testimony in the case to sustain a finding of any value in excess of \$25,000, even if the rule of market value be held not to apply in this case.

### SPECIFICATIONS OF ERRORS RELIED UPON.

#### I.

The court erred in finding and decreeing that the value of said steamship "Telegraph," at the time of her loss as mentioned in the pleadings herein, was the sum of forty-five thousand dollars (\$45,000.00).

#### II.

The court erred in finding and decreeing that the value of said steamship "Telegraph," at the

time of her said loss mentioned in the pleadings, was any sum in excess of twenty-five thousand dollars (\$25,000.00).

### III.

The court erred in awarding and decreeing to libelant herein, as and for its damage on account of the said loss of said steamship "Telegraph," and as and for her full value at the time of her said loss, the said sum of forty-five thousand dollars (\$45,000.00), or any sum in excess of twenty-five thousand dollars (\$25,000.00).

### IV.

The court erred in finding in this cause, under the testimony therein, that the rule of the market value of said steamship "Telegraph," at the time of her said loss, could not control in finding the amount of libelant's damage herein on account of said loss of said steamship "Telegraph."

### V.

Said court erred in awarding or decreeing to said libelant in this cause the said sum of forty-five thousand dollars (\$45,000.00), or any sum in excess of twenty-five thousand dollars (\$25,000.00).

## ARGUMENT.

### MARKET VALUE RULE.

The main question before the court on this appeal, is the amount libelant is entitled to recover as the value of the "Telegraph" immediately prior to the collision, and this question, must of course, be determined from the competent testimony in the case. Appellee will argue that there was no market for the vessel, or for stern-wheel vessels, and that the "Telegraph" was "in a class by herself," for which reason it should recover the cost of reproducing a vessel like the "Telegraph," less her depreciation. But, as we will show later on, this argument is wholly unsupported by any evidence in this case; while the uncontradicted evidence offered by appellant is that there was such a market; and we will contend that therefore the rule of market value must apply, unless a value is to be fixed arbitrarily, without regard to the evidence in the case, or the law applicable thereto. This, we believe, is the effect of the decision of the trial court, for, after discussing the evidence of market value and also of reconstruction, and characterizing both lines of testimony as of an "unsatisfactory character" (R. p. 356), the trial court went back to

the original cost of the vessel, and, after stating "that no one, much less the court, will be able to state with anything like mathematical accuracy the real value of the 'Telegraph' at the time in question," found her value to be \$45,000; which value it stated doubtless would be equally unsatisfactory to both parties. (R. p. 357). This finding, we think, was rather the guess of the court as to "what is right and just between the parties hereto," (R. p. 357) than a finding under the law and the evidence in the case.

We contend that the rule of damages in this case is the same as at common law, where property has been tortiously destroyed, namely, that the wrongdoer is liable for the market value of the property destroyed, before destruction, where it had a market value, unless in special circumstances *where the evidence shows* such market value to be so disproportionate to the actual value to the owner as to make it unjust to compel the owner to take the market value, instead of the special value to him. In this case, appellee does not claim, nor did it introduce any evidence to show, that the "Telegraph" had any such special value to it, which would be so much greater than the market value as to bring it within this exception to the general rule.

But it stands on the sole proposition that the evidence shows that 'there was no market for the "Telegraph,"' either because of her class, type or location, and therefore she had no market value; consequently the only way to determine her value is cost of reproduction less depreciation. It will not be disputed that the general rule is as claimed, and if that is true, we take it that the burden is on appellee, as owner of the vessel, to show want of market or market value, before it can claim the benefit of any exception to the general rule.

Spencer on Marine Collisions, Sec. 280, lays down the rule of damages in case of total loss as follows:

"Restitution is the rule in all cases where repairs are practical, and compensation when loss is total. The measure of damages in case of total loss is the market value of the vessel at the time of the collision, together with its cargo and freight, and such other losses as are a direct result of a collision. The market value of the vessel, and not its real or intrinsic value or cost of construction, is ordinarily the measure of damages. The recovery is limited to market value, and damages in excess of such value may not be assessed by reason of additional value to the owner owing to peculiar fitness for the trade in which it is engaged, or otherwise; nor is the market value to be determined by what the owner would have been willing to take for the vessel, but it is the

amount for which the vessel would have sold in the open market. The party at fault may not diminish the damages to be assessed against him by showing that the real value of the ship is less than the market value, by reason of its age, the defective nature of its construction, or other causes."

In the present case there is no question of loss of cargo, freight or other losses, except the mere value of the vessel. Spencer in the same section further states that where the conditions are such that no market value can be shown, or where there is no market value, or if such market value is so far disproportionate to the intrinsic value of the vessel as to make it unjust to compel the owner to accept the market value, then other means of determining the value of the vessel may be resorted to, such as the cost of construction, less depreciation. Again, in Sec. 201, Spenceer says:

"The general rule is that the value of the vessel is the open market value at the place where the collision occurred. This has no reference to what it is worth to the owner, or what he would have sold it for, but what it would have brought, offered unreservedly, in the open market. \* \* \* The fact that the actual value of the ship, by reason of age or other cause, is less than the market value will not relieve the party in fault from full payment of the market value of the vessel destroyed. \* \* \* Where from such or other circumstances the price the vessel would have

brought in the open market is in excess of the amount it would cost to reproduce it, the law affords to the wrongdoer no redress for such excess,—he must pay the full market value. The converse of this rule is true: that the owner of the vessel lost can only recover the market value of the ship, although this may be less than the price paid for it or less than the price of construction.”

Roscoe on Damages in Marine Collisions, page 24, states the rule in substantially the same way, and he gives the exception to the rule, as follows:

“It is obvious that some vessels may have a value peculiar to themselves, having regard to their use, or the position or occupation of the owner. Therefore, if either, owing to the absence of a market, or the particular and special character of her trade or work, the lost ship cannot fairly be valued at a market price, then the basis of the assessment is the value of the vessel to her owners as a *going concern.*” (Italics ours.)

And he cites in support of the exception the case of *The Harmonides*, 9 Asp. 354, which was a case of the loss of the steamship “Waesland” belonging to the Red Star Line, operating upon the Atlantic Ocean. The record in that case shows that at the time of loss, the vessel was on a voyage from Liverpool to Philadelphia with a general cargo and passengers. The evidence also showed that the owner had paid 18,000 pounds for the vessel, had

spent about 50,000 pounds in alterations and repairs to her hull, about 23,000 pounds on her engines and about 18,000 pounds on her cabin accommodations. Evidence was also offered of the yearly earnings of the vessel for her owners, and it appeared that vessels of her kind never came into the market until they were unprofitable or worn out. Under this testimony and the peculiar circumstances of this case, the court held that the market value of the vessel was not a fair test, and it awarded the sum of 31,000 pounds as the value of the vessel before she was lost, a little more than one-fourth her cost to her owners.

In the present case we have an entirely different set of facts. A small, stern-wheel vessel on Puget Sound, which could be operated on any one of the very large number of routes open to vessels of her kind, either on the Sound or on the rivers adjacent to Portland, where she could be and had been taken (R. pp. 126, 145, 179, 195, 297, 300, 313, 314, 343, 348), or on the bay or rivers adjacent to San Francisco, where she could be taken, or on the waters of British Columbia or Alaska, where she could be taken, certainly cannot be compared with a large ocean-going vessel engaged for years in transatlantic business, and being engaged at the very time of her loss in such business.

In MacLachlan's Law of Merchant Shipping, on page 349, the rule is stated as follows:

"If the vessel becomes a total loss in consequence of the collision, the measure of damages is her market value at the time of her loss; but if she has no market value, then the measure of damage must be fixed by considering what was the value of the vessel to her owners *as a going concern* at the time of her loss." (Italics ours.)

And in support of the exception to the general rule he cites the case of *The Harmonides*.

It will be remembered that in this case there is no evidence of the value of the "Telegraph" "as a going concern." There is no evidence as to what her earnings were, nor that she had any particular or peculiar value to appellee at the time she was lost, because of what she had earned or was capable of earning. The evidence does show that she had been laid up during the previous winter (R. p. 86), and that appellee laid up all of its stern-wheel vessels during the winter season; that the "Telegraph" had been in commission only about three weeks; and the sole claim made by appellee of any special value of the "Telegraph" to it, was on account of its claim that she had such great speed that it could use her in running out its competitors on the Sound, and, as expressed by Mr. Green, president of the appellee

company, breaking such competitors (R. pp. 89, 90). We do not think such an element of value one which will appeal very strongly to the court.

Marsden's Collisions at Sea, 6th ed., page 101, states the rule as follows:

"If the ship is totally lost, the owner is entitled to recover her market value at the time of the collision; and her value at her home port, and not in the foreign port to which she is taken after collision, is to be taken. Where the ship is of a special construction or character, and, although of special value to her owner, has little or no market value, damages must be estimated by considering what is her value to the owner as a *going concern* at the time she was lost." (Italics ours.) (Citing in support of the exception the case of *The Harmonides*.)

"The value of a vessel lost is what she could have been sold for in the open market in her condition immediately preceding the collision."

*7 Cyc. 392.*

"It is well settled in this district that the rule of damages is the market value of the vessel at the time and place of her destruction."

*The Utopia*, 16 Fed. 507.

"The vessel being a total loss, her value just before the collision is the measure of damages. The difficulty is to ascertain the value. The criterion is what she would have brought in the market, not under the hammer at a forced sale, but in the ordinary course of sales of such property."

*The Colorado*, Fed. Cas. No. 3029.

One of the earlier cases on this question, decided by the United States Supreme Court, is the case of *The Baltimore*, 8 Wallace, 377, 386, where the court says:

“Restitution or compensation is the rule in all cases where repairs are practicable, but if the vessel of the libelants is totally lost, the rule of damage is the market value of the vessel (if the vessel is of a class which has such value) at the time of her destruction.”

One of the leading cases on this question is the case of *The Laura Lee*, 24 Fed. 483, where the court discusses at considerable length the reasons for the rule that the market value and not the value to the owners is the measure of damages in case of total loss. The court uses the following language:

“The libelants insist that the value of their boat was the amount she was worth to them when in their use, and that they are now entitled, in the adjustment of these losses, to have their boat so valued. I do not agree with their method of estimating their loss; it may be, for the sake of this argument, conceded that the libelants rightly considered their boat worth more to them than she would have been to any one else; it may be that her owners would have felt justified in refusing to sell her for what may have been her commercial value at the time of the collision. In adjusting the loss claimed to have been incurred by the libelants,

we must keep in mind the fact that the Greenville is lost to all persons concerned, and that for the purposes of this suit we must consider that no one, more than another, is to blame for her loss; besides, we should consider that in every sale the consent of the owner of the thing sold must be obtained, and that it is often the case that such consent to sell has to be paid for by the purchaser in addition to the sum which may in the market fully represent the value of the thing sold. When the Greenville became a wreck, the power on the part of the libelants to consent to part with her ceased, and the owners of the Lee should not now be required to contribute any sum which represents the amount which the owners of the Greenville might have felt justified in asking from a purchaser for their consent to be deprived of her especial usefulness to them."

"The owner is entitled to have the vessel estimated at its market value at the time of her destruction. His loss is the price it would produce on sale. Claimants cannot overcome that evidence by proving the vessel worth, intrinsically, less money because of her insufficient build, her old age, or the actual state of her timbers."

*The New Jersey*, Fed. Cas. 10162.

Of course, the converse of the last statement must be true, that an owner cannot claim a value in excess of the reasonable market value, because of the good condition of the timbers or machinery, or because of the speed the vessel might be capable of making. In this case the only testimony offered to

show any special value of this vessel, which would entitle appellee to that special value rather than the market value, is the claim that the vessel was very fast. Even if it were true that this vessel was one of the fastest stern-wheel vessels on Puget Sound, that fact alone would not place the vessel outside the class of vessels having a market value and entitle the owner to recover the special value to it instead of the market value. It would simply increase the market value. So, if the vessel was very slow, appellant could not escape paying the reasonable market value because of that fact alone, but that fact could only be considered in determining what the market value was; and whatever that value was would be the amount appellant would be required to pay, and the only amount appellee would be entitled to recover.

In the case of the *City of Alexandria*, 40 Fed. 697, Judge Brown of the Southern District of New York states the general rule to be that,

“Upon a total loss by collision, the ordinary rule of damages is the value of the vessel with her net freight upon the pending voyage, and interest from the time of its probable termination, had the loss not occurred.”

In that case the “Queen,” a dredge of peculiar construction, was sunk and totally lost. The court

found that there was no such market as to establish a market price "for such structure;" but, of course, the "Telegraph" could not be placed in the class of a peculiarly constructed dredge.

In the case of *The Hamilton*, 95 Fed. 844, Judge Thomas of the Eastern District of New York states the rule as follows:

"The rule relating to the injury of personal property on land is that the value of the property, if totally destroyed or injured beyond profitable repair, is recoverable with interest; but if the property be injured, but be capable of economical restoration, compensation for its diminished value and for loss of its use is recoverable. The same rule applies to ships injured or destroyed. \* \* \* The law does not consider that the sunken ship is incapable of replacement. It rather considers that ships are commodities bought and sold in the market, and that one may be purchased to take the place of one lost."

"The vessel here was a total loss. The rule of damage is the market value of the vessel (if it is of a class which has a market value) at the time of her destruction. *The Baltimore*, 8 Wall. 386, 16 L. Ed. 463; *The Granite State*, 3 Wall. 313, 16 L. Ed. 179. The measure of damages is the value of the vessel in its condition just prior to the collision, to be measured by its market value, and not by the price for which the owners would be willing to sell it, or may have paid for it. The party in fault cannot reduce the amount recoverable by showing

that the lost vessel was worth intrinsically less than its market value."

*The Mobila*, 147 Fed. 882.

"If the injuries were such as amount to a total loss, the rule of damage is her market value at the time of her destruction, if she has any market value (citing authorities). In ascertaining the market value of a vessel destroyed in a collision, the best evidence is, in general, the evidence of competent persons, who knew the vessel, and the state of the market, and who testify as to its market value."

*The Lucile*, 169 Fed. 719.

See also *The Frank Hall*, 128 Fed. 815.

We think the foregoing authorities settle the rule beyond question as we contend. Nor do we think anything in the cases which have been cited by appellee in the court below tends in any way to sustain a different rule. The case of *Wetmore vs. The Granite State*, 70 U. S. 214; 3 Wall. 314, was not a case of a total loss, and all that was said in the opinion relative to the market value was mere obiter. That case has been cited repeatedly as sustaining the rule we contend for, and it certainly cannot be construed as an authority that vessels have no market value at all. All that the court meant in a quotation which will be referred to by appellee, was that vessels do not have an established market value, such as grain, cotton or stock.

This, of course, is true of various other kinds of property, to which unquestionably the rule of market value applies when they are taken or destroyed.

Another case which will be referred to by appellee, is the case of *The H. F. Dimock*, 77 Fed. 226. That case was decided by the Court of Appeals for the 1st Circuit, and involved the loss of the private yacht "Alva," belonging to William K. Vanderbilt. It was claimed in that case by libelant that because of the character of this yacht, and the fact that the only purchasers for a vessel of that kind would be men of great wealth, who happened to desire a pleasure yacht and would be willing to buy such a vessel at a fair price, there was no market for the vessel, and that therefore libelant was entitled to recover the cost of reproducing such a vessel, less whatever her depreciation might be. The evidence showed that the vessel cost from \$380,000 to \$400,000, and that libelant would not have sold the vessel for less than \$275,000 to \$300,000. The court discussed at great length different classes of property and measures of values for these different classes. It divided these classes into four sub-divisions: The first being such as family portraits, heirlooms, etc., upon which no market value could be placed, and as to that class held that the just rule of damages is the actual value to the owner,

taking into consideration the cost, practicability, and expense of replacing it, and such other considerations as in the particular case affected the value to the owner. Of course, it did not place the "Alva" in this class. In the second class it placed property which should be valued merely as property, and not because of any peculiar value to the owner, but where the rule of the market value would either be unjust or impracticable or impossible to apply. It did not place the "Alva" in this class. The third sub-division made, is the great class of property which has a recognized market value. And the fourth class includes property which, while not having a recognized market value, nevertheless, has actual property value, as distinguished from any particular value to the owner, which was to be considered in determining the value.

The court stated, "It cannot be questioned that the yacht in controversy here was 'marketable property' in the general sense of the term." The court then proceeded to distinguish the yacht in question from the property included in the first three subdivisions mentioned, and placed the yacht in the fourth class along with such property as "dwellings of more than mere moderate cost, erected away from actual centers of thickly settled cities, and much

other property acquired for domestic or personal uses," and then held that to fix the value of this character of property by the market value would work an injustice, that other things should be considered in determining the value.

The court said, "It is still the pecuniary interest which is to be valued," and held that even in cases of a pleasure yacht like the "Alva" "one inquiry of practical value would be, what amount any person of sufficient means, desiring to acquire a yacht of her size and character, or any other property of a special kind, might reasonably be expected to be willing to pay for the same, rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new, by reason of the probable improvements and the other advantages which the new offers." Considering all the elements proper to be considered in determining the value of this special kind of vessel, used only for pleasure by a very limited class of people, instead of commercially by a large class, the court sustained a finding of \$191,000.00 value, or about *one-half its cost.*

Certainly, the "Telegraph," a small, stern-wheel vessel, operating for years on inland waters, where there are many routes upon which she could

be used, all of which are open to any one wishing to place a vessel upon them, cannot be compared to a private yacht built for a multi-millionaire at enormous cost. If the "Telegraph" had any great value on account of her speed or peculiar construction, or for any other reason, she had this value for a purchaser as well as for appellee. No exception to the general rule is furnished, merely because the owner of the property destroyed, through its money, business sagacity, or even the use of such vessels as the "Telegraph" in "breaking" its competitors, may have acquired a practical monopoly of the best steamship runs on the waters where the vessel has been operated. There is nothing to prevent other persons using these same means to compete with, and even "break" appellee, and use the "Telegraph" for that purpose, if she had such great speed and was of such great value for this purpose; and we have no doubt that if the "Telegraph" was such a fast vessel as appellee claims, and therefore of such great value in monopolizing or retaining a monopoly of these various runs on Puget Sound, her greatest value to appellee was to hold and prevent some one else getting her and attempting to break up its monopoly. However, even if this were the fact, which we do not concede, it would not furnish any legal reason for compelling appellant in

this case to pay any such fanciful or excessive value for the vessel, because it was unfortunate enough to sink her.

The case of the *Conqueror*, 166 U. S. 110, which will be cited by appellee, is not an authority in any sense upon the question here. In that case Mr. Vanderbilt was suing for damages for detention of his private yacht, and on the question of *demurrage* the Supreme Court said:

“The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market. Obviously, however, this criterion cannot often be applied, as it is only in the larger ports that there can be said to be a market price for *the use* of vessels, particularly if there be any peculiarity in their construction which limits their employment to a single purpose.”  
(Italics ours.)

The court goes further and shows what is the correct measure of damage where no market value can be determined, and states the rule as follows:

“In the absence of such market value, the value of her use *to her owner in the business in which she was engaged at the time of the collision* is a proper basis for estimating damages for detention, and the books of the owner showing her earnings about the time of her collision are competent evidence of her probable earnings during the time of her detention.”

The court, by this language, recognizes that it is not some fanciful or imaginary value to the owner which forms the basis of the measure of damage, either for detention or for loss, but it is the value to the owner as a going concern capable of earning money for him which is to determine in the absence of a market value. In this case, as we have said before, there is not a word of evidence to show that the vessel had any value to her owner from an earning standpoint, nor any value which she would not have equally to any one else. Nor does the case of the *Conqueror* hold, as proctor for appellee has contended, that Seattle is not one of the "larger ports" where there would be a market for vessels which could be used upon the waters tributary to that port.

We think the court will be satisfied that our statement of the law relative to the measure of damages is correct; and that it will only inquire whether or not the evidence in the case brings appellee within any exception to that rule, so as to make the rule of market value inapplicable.

## EVIDENCE OF MARKET VALUE.

As stated by the trial court in its memorandum decision (R. p. 352), appellee concedes that if the evidence shows that the "Telegraph" had a market value at the time of her loss, such value would be the measure of recovery in this case. We believe, however, under the authorities above referred to, that the correct rule is, that presumptively there was a market for the vessel, and that she had a market value; and before appellee could claim a value based upon other evidence than market value, or the court could find a value upon any other basis, appellee must show by a fair preponderance of competent testimony, that there was no market for the vessel, and therefore she had no market value.

Appellee alleged in its libel that the "Telegraph" "immediately prior to the time of said collision, was of the value of fifty-five thousand dollars." (R. p. 7.) There is no allegation that this "value" was any special value to appellee, or other than such value as is ordinarily recoverable where property is destroyed, to-wit: market value. In taking its testimony, appellee wholly ignored the question of market value, and proceeded over appellant's repeated objections (R. pp. 13, 14, 18, 19,

20, 21, 29, 30, 32, 38, 40, 45, 49, 51, 54, 56, 72, 82, 84, 112), to offer evidence of the original cost of the vessel, and also *ex parte* bids for building a vessel which it claimed would be like the "Telegraph" in build and speed. If it were justified in thus peremptorily setting aside the well established rule of market value, still it offered no evidence which would support a finding under the "going concern" rule so clearly stated by the authorities cited, as the basis of values in the absence of a market value, although, if the "Telegraph" had a "going concern" value, the facts necessary to show it were peculiarly within the control of appellee.

Until after appellant had made its objections to this testimony, as not furnishing a proper basis for assessing damages in this case, appellee did not offer a particle of evidence that there was no market for the "Telegraph," so as to come within the exceptions to the general rule. And all the evidence ever offered by appellee on the question of market or market value for the vessel is the following:

Capt. H. B. Lovejoy, one of appellee's witnesses, was asked the following questions, to which he answered as follows:

"Q. Is there any market, Captain, for steam-boats? Can you put them on the market the same as you can a horse?

MR. MERRITT: I object as incompetent, irrelevant and immaterial, and the witness has not shown himself qualified to testify.

A. No, you cannot.

Q. You have testified that you are familiar with the steamboat business on Puget Sound, haven't you?

A. Yes, sir.

Q. And particularly with that class of vessels?

A. Yes, we have one.

Q. You say there is not any market?

MR. MERRITT: I renew my last objections.

A. I would not think there was any regular market for a boat. I can illustrate that about the "Vashonian;" that cost twenty thousand dollars and sold for something like thirty-five hundred dollars two years ago. The boat was worth the money, but they did not have a run for her. I could not use her on my run, for instance, and I would not think you could figure on a market for a boat unless there was a place for it."

The witness was manager of a small line of Sound vessels, but was not and never had been in the business of dealing in vessels, and did not pretend to know anything about the demand for vessels like the "Telegraph" where she could be taken or used (R. p. 77). His example of the sale of the "Vashonian," a vessel which had been sunk for some time (R. pp. 79-80), would hardly have much weight in showing there was no market for a vessel like the "Telegraph" afloat.

The only other testimony ever offered by appellee on either of these questions was the following question asked of Mr. Green, president of the appellee company, to which he answered as follows (R. p. 84) :

“Q. Is there a general market for vessels on Puget Sound or any other place?

A. No. A vessel is a liability if you haven’t a route to put her on. She is far from an asset. She will cost you money to keep up. She makes no earnings unless you have a route for her.”

The witness had not shown himself competent in any sense to answer the question, and such testimony could have no bearing upon or weight in determining the question of market for or market value of the “Telegraph,” and our motion to strike the answer, we think, was well taken (R. p. 84). If the witness’ answer is correct, then there is no market *anywhere for vessels of any kind*, and the rule of market value could *never* be applied to vessels, and all the decisions we have referred to were made upon an *entirely wrong basis*. We hardly think the court will so hold.

On the other hand, appellant offered the testimony of a number of very competent witnesses to the effect that there was a market for the “Telegraph” at the time and place of her loss; and also as to what her market value then was.

Captain Gilmore H. Parker, a master on Puget Sound for over 30 years (R. p. 125) and for some time master of the "Telegraph," testified that she could have been taken to and used on other waters than Puget Sound (R. p. 132).

Captain Charles E. Wilson had been a master mariner since 1882, a resident of Seattle since 1890, and engaged in the business of buying and selling vessels at Seattle for nine years (R. p. 144). He knew of many sales of stern-wheel vessels, has sold a great many other vessels, and was more familiar than any other witness with the market and demand for vessels of all kinds at Seattle. He testified that the "Telegraph" could have been taken to and used at other places along the coast than Puget Sound; and that in his opinion there was a market for the "Telegraph" when she was sunk. It is true that he testified that the "Telegraph" was "obsolete and out of date," and that there had not been as many transfers of stern-wheel vessels as of other boats, but certainly that fact does not prove that there was no market for a vessel like the "Telegraph;" it merely shows that, like any other old or out-of-date piece of property, the demand for such a vessel was not as great, nor the market price, compared with cost of construction, as high as for more modern and practical vessels.

Appellee appreciates the force of Capt. Wilson's testimony, which it did not even attempt to dispute; but it has sought to weaken its effect by reference to him as "Cyclone" Wilson, a name some people on the waterfront called him. However, we believe the court will be satisfied after reading Capt. Wilson's testimony (R. pp. 144-172) that he knew what he was talking about; and the many sales of vessels referred to by him, which are undisputed, show that the general rule should apply in this case.

Witness Geo. N. Skinner, who had been engaged in the shipping business many years, testified that the "Telegraph" could have been taken to and used upon any of the inland waters along the coast (R. pp. 178-180). He testified that in his opinion there was a market for her; that he himself had tried to buy her since she was raised (R. p. 181); and she had been offered to him, rebuilt, and in as good condition as it was possible to put her in, for \$19,000.00 (R. p. 182).

Capt. S. B. Gibbs, master mariner and for eleven years agent and surveyor for the San Francisco Board of Marine Underwriters at Seattle, testified on this question. He knew the "Telegraph," knew where she could have been used, and was par-

ticularly familiar with shipping and vessels on the coast. He gave instances of sales of other similar vessels, testified that in his opinion there was a market for the "Telegraph;" that he had sold even the wreck, and that her market value was \$25,000 (R. pp. 193-200). Appellee will claim that Capt. Gibbs' information of other sales was hearsay, but that is true of nearly all information of other sales, which information qualifies a witness to testify on these questions. But it will be remembered that appellee did not attempt to disprove the testimony concerning other sales given by any of appellant's witnesses.

Capt. T. W. Spencer, of Portland, testified to a voluntary sale of his stern-wheel vessel the "Spencer," about one year before the "Telegraph" sunk, for \$25,000. The "Spencer" was larger and faster than, and about the same age as, the "Telegraph," and was then in very good condition (R. pp. 297-298.)

C. W. Cook, Pacific Coast manager of the American-Hawaiian Steamship Company, at San Francisco, formerly of Seattle, knew the "Telegraph," and testified concerning sales of other similar vessels, and also that a large number of other similar vessels had been taken to different places

along the Coast, which had been and could be done with the "Telegraph" (R. pp. 313-318).

Joseph Supple, a ship builder at Portland, Oregon, for 25 years, testified that the "Telegraph" could have been taken "anywhere on the Pacific Coast or to Alaska" (R. p. 348), and in answer to the following question: "State, if you know, whether or not there was at the time and place the 'Telegraph' was sunk a market for said vessel and vessels of her kind and type" (R. p. 328), he testified:

"There was, at the time and place the 'Telegraph' sunk, a market for stern-wheel vessels of normal, practical type, that could be used for tow-boats or freight boats or passenger boats, or all combined. There was then a ready sale at fair prices for such boats. The 'Telegraph' was a peculiar type of boat, built only for passengers and not fit for towing or carrying freight. The demand for her would be best for a strictly passenger run. In my opinion, if she had been offered for sale before she was sunk she could have been sold at some price, but not for as much in proportion to her cost as a stern-wheel boat of more practical type."

Mr. Supple was one of the "responsible builders" (R. p. 84) from whom Mr. Green obtained bids for reproducing the "Telegraph," and was certainly one of the best qualified of men to know whether or not there was a market for her. On cross-examination this witness testified that "Stern-

wheel vessels are being bought and sold all the time and new ones are being constructed on the coast" (R. p. 350).

Marcus Talbot, general manager for the Port of Portland Commission, testified for appellant on this question. He was especially well qualified to testify, having been engaged in shipping at Portland and Seattle for many years (R. pp. 338-339). He knew the "Telegraph;" had bought and sold stern-wheel vessels where she could be taken and used, and knew of others having been bought and sold there (R. pp. 332-339). He stated positively that at the time the "Telegraph" was sunk there was a market for her at Seattle (R. pp. 333, 339); and in answer to a cross-interrogatory gave the names of a number of stern-wheel vessels which had been sold within a short time previous (R. p. 341).

In the face of this evidence, which stands undisputed, from witnesses of such high standing and wholly disinterested, we fail to see how appellee sustained the burden upon it of showing there was no market for the "Telegraph," by the mere general statements of its two witnesses above referred to, even if their testimony was competent; and it would seem to us that the court must be satisfied that there was such a market.

Appellee did not offer any evidence of the market value of the "Telegraph," either to show that she had no market value, or that if so, it was disproportionate to her intrinsic value. On the other hand, a number of appellant's witnesses testified as to her market value at the time and place she was lost. Capt. Wilson placed her market value at \$16,000 (R. p. 146). Mr. Skinner had tried to buy her after she was raised, and she had been offered to him rebuilt and put in good condition for \$19,000 (R. p. 181-182). Capt. Gibbs placed her market value at \$25,000 (R. p. 194). Mr. Cook placed it at \$20,000 (R. p. 315). Mr. Talbot placed it at not to exceed \$25,000 (R. p. 339).

Besides the opinions of these very competent witnesses on this question, we have for comparison, the prices at which other similar vessels had been sold in the market which was open to the "Telegraph." In the first place, we have the sale of the "Telegraph" herself. Appellee purchased the "Telegraph" and "City of Everett" and the route upon which they were being operated for \$55,000.00 in the fall of 1910, about a year and a half before she was sunk (R. pp. 58, 91, 96). The "City of Everett" cost about \$42,000 to build about a year before the "Telegraph" was built, was in good condition when sold and, according to Capt. Scott, who

sold the boats, was worth more than half as much as the "Telegraph" (R. p. 59). But appellee had both vessels insured upon approximately the same value (R. pp. 95, 143). The "Cochrane," a larger and better boat sold for \$8,000 (R. p. 152); the "Greyhound" for \$4,200; the "Nunivak" for about \$15,000 (R. p. 153); the "Telephone," a larger and better boat built by the builder of the "Telegraph" (R. p. 65), was sold for \$24,500 or \$24,800 (R. pp. 199, 318, 341); the "Spencer," also a larger and faster boat, was sold for \$25,000 (R. pp. 297-298); the "Ocean Wave" for \$10,000 (R. pp. 314, 316); the "North Pacific" for \$10,000 (R. p. 315); the "State of Washington" for \$17,000 (R. p. 341); the "Capitol City" for \$17,000 (R. p. 341).

The testimony concerning these sales is undisputed; nor is there any dispute that many of these vessels were larger, better, more powerful and in the case of the "Telephone" and "Spencer," at least, faster than the "Telegraph." When the court compares these vessels with the "Telegraph" as shown by the evidence, and considers the price at which they were voluntarily sold, we think it will feel that the market value of \$20,000 to \$25,000 placed on the "Telegraph" by appellant's witnesses is very liberal.

Appellee did not attempt to dispute this evidence, but contented itself with trying to show some reason why it should not take in this case a sum proportionate to what it paid for the vessel and valued her for insurance purposes, and what owners of other similar vessels had been willing to sell for.

It did not offer a word of evidence as to the "Telegraph's" earnings; it did not show her charter value; it did not claim it had any special need for her, it did not dispute the testimony of appellant's witnesses that she was out of date for a passenger vessel, about the only use which could be made of her, and that it was replacing its stern-wheel vessels with modern, iron, propeller vessels (R. pp. 133, 146, 160, 181, 186, 204, 314, 316, 318, 348). On the other hand Mr. Green admitted that the "Telegraph" and all the company's stern-wheel vessels are laid up during the winter months and that she had been in commission only about three weeks before she was sunk (R. p. 85).

In fact, appellee's sole claim of a special value for the "Telegraph" was that she was very fast; Mr. Green, without showing any knowledge of the matter whatever, even went so far, in his zeal to recover a large value for this old, out-of-date boat, as to testify that "She was the fastest stern-wheeler in

the world; that has never been disputed" (R. p. 83). That this statement is wholly incorrect, we refer the court to the undisputed testimony of appellant's witnesses, that at least the "Telephone," the "Spencer," the "H. J. Cochrane," and the "Bailey Gatzert," all stern-wheel vessels, were faster, having actually raced with and beaten the "Telegraph" (R. pp. 127, 131, 151, 152, 297, 298, 300, 303, 315, 339, 342, 343, 347). While we do not think if appellee's claim that the "Telegraph" was such a fast *stern-wheel* vessel, or even if she was the *fastest* stern-wheel vessel on the coast, that would place her "in a class by herself," so as to entitle appellee to recover a value higher or different from her market value; but that fact would only affect her market value, just as the fact that a vessel was very slow would not entitle one destroying her to pay less than her market value. But as we have shown, this claim of appellee is not only not proven in this case, but it is conclusively shown that other stern-wheel vessels on this coast, larger, more practical and better in every way, were also faster; and had been sold in the market for less than half what appellee asks for the "Telegraph" in this case.

Appellee has argued, and will probably argue here, that a market exists at a certain time and place

for a given article, only when other similar articles are shown to have been openly and generally sold *at that time and place*. It has the idea that there is no market at a given place for a *moveable* article, unless it is shown that there are persons *at that place* who would have a use for the article *there*, and that such persons have purchased similar articles *at that time and place* for use *there*. This might, to a certain extent only, be true concerning immovable property, which could be used only where it lay. But it cannot be true of *moveable* property which can be taken elsewhere and used.

In the case of real estate, of course, if there is no demand for its use where it is, it could not be said to have a market value. For instance, the richest agricultural land in central Alaska would have no market value. But suppose cattle were raised on this land, where there was no one to use them, but persons living elsewhere could take them where they could be used, would they not have a market value *where they were raised*, the amount of such market value depending on the cost of taking the cattle where they could be used, and their value at that place? Nor would the fact that cattle were never before raised or sold at that place or taken from there, prove, as appellee would claim that they had no market value there.

Suppose such cattle were destroyed where raised and neither their owner nor any one else had any personal use for them there, could such owner recover the cost of raising other cattle there, instead of what the cattle would have been worth to one taking them where they could be sold and used?

To establish a market and market value, it seems to us all that need be shown is that the commodity in question is such as is used and bought and sold commercially; having a value as property only; that others in the same business as the owner use such commodities and sometimes go into the market to buy them; and that this particular commodity is so located that such other persons could know it was for sale and, having purchased it, could use it there or take it where it could be used. And in this case, even if appellee's claim were true, which neither the evidence proves, nor common knowledge sustains, that there was not a person at Seattle or on Puget Sound who had or could find use for the "Telegraph," or would have purchased her if offered for sale; nevertheless, because vessels like her are used on other waters along the coast, where she could be taken and used, and other similar vessels are being bought and sold and constructed for use on such waters, therefore there was a market

for the "Telegraph" when and where she was lost. But, of course, the claim that no one on Puget Sound could or would have bought or used her is not correct in fact, nor based on any evidence in the case; but is mere argument to try to sustain a claim for an excessive value for the vessel. In fact, our evidence shows that more than one party wanted to buy her there and even the wreck was sold there (R. pp. 181, 196, 197).

Nor is appellee's argument that there was no market shown, because frequent, recent sales of vessels were not shown, any more sound. It is not the *frequency* of sales of property which determines whether or not it has a market value. Suppose a railroad was to condemn real estate in a community where not a piece of real property has been bought or sold for years, although it was all in actual use by persons who had not cared to sell, would not its market value, as shown by competent witnesses, be the measure of damages for the taking?

Take another case, suppose a very valuable race horse was killed while being carried on a railroad. Similar horses might not have been bought or sold for many years, but could the owner therefore, show the great time, labor, expense, etc., of raising, and uncertainty of being able to raise, another horse

like it, to show its value; or would the opinion of dealers in race horses as to its market value, be proper in a suit for its loss? Or suppose similar horses had been frequently bought and sold in New York, so that the market value if killed there would govern, would a different rule apply, if the horse was killed while being carried across the deserts of Nevada, where the horse could not be used and no such horse had ever been bought or sold?

It seems to us that these examples show the unsoundness of appellee's argument in this case, which, as we have stated before, is not based upon any evidence in the case, but is contrary to the positive testimony of competent, disinterested witnesses for appellant.

Appellee's argument at most, shows that the market value of the "Telegraph" was not as great, in proportion to her cost, as it would have been if she had been a more modern, up-to-date or different vessel; but does not show that the general rule does not or should not apply. If appellee's argument is correct, all one need to show, in order to recover many times what a commercial article is worth to others using or desiring such an article, would be that articles like his had not been frequently and recently sold where his was destroyed; although the

only reason might be that his article was so much out of date, or of so little practical use, as not to have any great value to the owner or any one else.

It must not be forgotten that the "Telegraph" was used, and could only be used for commercial purposes, and that the sole value to appellee or any one else, was her earning capacity. Nor will the court overlook the undisputed evidence that she was built almost solely for speed and carrying passengers, having little freight carrying capacity, and not as practical as other vessels for towing; also the undisputed fact that she was out of date for carrying passengers, being laid up during the winter months, while a different class of vessels was being rapidly constructed to handle the passenger business on Puget Sound.

Captain Scott, her builder, on his direct examination, was asked the question, "Was she designed and built for speed?" And answered, "Yes, entirely for speed; passenger boat" (R. p. 55). And he testified how he had spent "nights and Sundays" thinking how to get that speed in a stern-wheel vessel (R. p. 70).

Mr. Green testified that "The steamer had been laid up during the winter months as usual, our stern-wheel steamers are usually laid up," (R. p.

86); and he testified that her value to appellee was "for this reason, the 'Telegraph' was very fast. When we have opposition on any of our runs we need an implement like the 'Telegraph' to offset the opposition. We can beat any other steamer that comes against us with the 'Telegraph'. We used her for that and she is valuable for that purpose" (R. p. 89). He said they used her on one route "until we broke our competitors, and then took her off" (R. p. 90); but admitted that she was taken off this route because "we found that there was very shallow water there and she did not handle very well and we put on another boat. *We have two or three boats of that style to be used for that purpose*" (R. p. 90). He admitted that they "never ran the 'Telegraph' at twenty miles an hour on her commercial speed; we ran her about eighteen miles" (R. p. 114).

Captain Parker, Master of the "Telegraph" for a long time, testified that she was built largely for carrying passengers and did not have much freight capacity (R. p. 131). He also testified that vessels like the "Telegraph" are not now being built and used on the Sound runs; that "Captain Green is building a different class of boats now." "Iron and steel boats, rather, propellers," which are tak-

ing the place of the old stern-wheeler (R. p. 133); that the only value she would have as a passenger boat "would be to reserve her as an extra to take another's place occasionally, on runs like Seattle and Tacoma, and over to Bremerton or Olympia" (R. p. 140); and that if a run was already occupied "the old 'Telegraph' could not go on that run and make anything at all," because she was not equipped to take business from boats already on a line (R. p. 141).

Captain Wilson testified that "vessels of that class I would say are obsolete and out of date" (R. p. 146). That stern-wheel vessels can be used as tow boats, "But since the competition in towing with boats of the propeller type they have not been in much demand" (R. p. 150). He also testified that the "Telegraph" was a "freak" boat (R. pp. 156, 165); and that such vessels as these are out of class on Puget Sound. "On some rivers they use them. On the shallow rivers they are the best, but they are usually lighter draft. Now, then, there is a lot of real value in them, like an old automobile; they give good service, yet you can buy them for almost nothing. They are out of date, and there are not many people who desire that kind of an old vehicle or steamboat" (R. p. 160).

Mr. Skinner testified that stern-wheel vessels are out of date on the Sound (R. p. 181); that "Mr. Green is getting rid of that class of boats. He is building an entirely different class of vessels, building as rapidly as he can to cover the different routes, and I would assume that that class of vessels is not of the class that he wants" (R. p. 185).

Captain Gibbs testified that he did not think the "Telegraph" practical for carrying freight or towing; that she was built principally for speed and passenger trade (R. p. 194); and that appellee is constructing new, iron, propeller boats to put on its Sound routes (R. p. 204).

Captain McDonald, a witness for appellee, testified that the "Telegraph" was "hard to steer. Very few men can steer her, on the Sound. She is apt to travel three miles out of every twenty winding around the Sound trying to steer her," that she was "The hardest thing I ever got hold of to steer" (R. p. 254).

Mr. Cook testified that when he left Seattle in 1906 "steamboat owners were going in for the more modern screw boats" (R. p. 314); and that "The 'Telegraph' was built in 1903 for carrying passengers between Everett and Seattle, where there was

then no very strong competition. Since that time an electric railway has been completed between these two cities and any other run for which the ‘Telegraph’ was suited has been covered by more modern steamers” (R. p. 318).

The evidence shows that the “Telegraph” had been taken to Portland and operated for several years on the rivers there, but was returned to her old run on the Sound. The record does not show why she did not remain at Portland, but does show that other stern-wheel vessels there were faster, and that she had little capacity for freight; and we can properly assume that she was not a profitable boat to operate at Portland, where stern-wheel vessels are especially useful. As stated by Mr. Talbott, “she could not have as great a value as other stern-wheel vessels of equal cost and in the same condition, but which were built for all around purposes” (R. p. 340).

Mr. Supple testified that “the ‘Telegraph’ was a peculiar type of boat, built only for passengers and not fit for towing or carrying freight. The demand for her would be best for a strictly passenger run.” Also that, although he had built at least fifty stern-wheel vessels, “the ‘Telegraph’ was a different type than any I have built. She was built

for speed and passengers. She was not a practical vessel for the river runs. If she had been a more practical type of stern-wheel vessel, in my opinion she would have had a much greater value" (R. p. 349).

None of this testimony was disputed by appellee, and, therefore, the court is called upon to fix the value of a *peculiar and impractical type* of an *out of date* class of vessels, which could not, as stated by these witnesses, have the value of a more practical type of the same class of vessels.

Appellee will, of course, argue that this testimony shows there was no market for the "Telegraph," and therefore, the rule of market value cannot apply. But no authority can be found to sustain such a rule, nor is it reasonable or just. As well might it be claimed that the rule of market value did not apply in case of loss of an old, out of date automobile, because few such machines are bought or sold, and there is little demand for them; therefore, that the cost of building a new machine *like the old one*, less its physical depreciation, which might be very small, should be the measure of recovery. If that was correct, the owner of such an old, out of date machine, if in good repair, could recover more for its loss, than could the owner of a

late model having every modern convenience and appliance. We submit this is neither justice nor good law.

We do not mean to say that the "Telegraph" was useless or of no value; but we do claim that the mere fact that she was fast among her class of vessels, and fitted for passenger service only, does not deprive her of her character as marketable property, the value of which is to be determined by what she was worth in the market; especially when she was in a place where hundreds of such vessels could be used, where other similar vessels have been bought and sold, have been and are being constructed, and have been and are being used. Any argument which attempts to place the "Telegraph" in a class that would have no market value at Seattle, simply shows her *lower value*, instead of justifying a finding of value based upon the cost of reproducing a similar vessel. There is no claim on the part of appellee that it ever intended or desired to build another vessel like the "Telegraph"; but it stands undenied that such vessels are being replaced, even by appellee itself, by different, more modern and more practical vessels.

## APPELLEE'S EVIDENCE OF VALUE.

Contending, solely because of its claim of this excessive speed of the "Telegraph," that it is entitled to recover a value based on other grounds than her market value, appellee proceeded to offer evidence to prove such other value. This evidence was the cost of building a vessel which it claimed would be a duplicate of the "Telegraph" in build and speed, also original cost of the "Telegraph," and her physical depreciation.

The trial court refused to accept the evidence of cost of reproduction, "as a fair guide to the determination of the award to be made"; and characterized it as of an "unsatisfactory character" (R. pp. 355, 356). At the same time the trial court admitted that it was influenced by this evidence (R. p. 354).

We think this evidence was not only "unsatisfactory," but entirely incompetent; that its admission before a jury would have been error, and, as appellant at all times objected to it (R. p. 354), it should have been and should now be, entirely disregarded by the court.

The first witness called by appellee as to cost of reconstruction, was Mr. Frank Walker, a marine

surveyor, naval architect and consulting engineer. Over appellant's objection he testified that it would cost \$75,000 to \$80,000 "to build the steamer "Telegraph" at the present time, as a new vessel, reproducing her both as to dimensions and form and so forth, *and also as to speed*" (R. p. 19). He did not testify as to having built any such vessel, or that he knew of any such vessel having been built; and when asked to give the cost of different parts of such a vessel, not only could not give an estimate of the cost of such parts, but *flatly refused to try to do so*. Sufficient in itself to discredit his previous testimony (R. pp. 23-27). Certainly, testimony as to a lump sum for the cost of construction of a vessel can have very little weight, where the witness cannot even give an estimate of the cost of different substantial parts of the vessel. It is very evident, however, that Mr. Walker's testimony was based solely upon the bids hereafter referred to, and it certainly contemplated a stern-wheel vessel capable of making twenty miles per hour, which we feel satisfied the court will find from the evidence the "Telegraph" could not make.

Mr. Green, president of appellee company, testified that he undertook to get estimates from steam-boat builders on Puget Sound and at Portland for

the replacement of the "Telegraph," and, over appellant's objection, testified that these estimates ranged from \$80,000 to \$100,000 (R. pp. 82-83). He stated that all of these estimates were for a stern-wheel vessel guaranteed to make twenty miles per hour, sustained speed, which he admitted was an almost impossible condition (R. pp. 91-92, 113-117). The bidders were not furnished any specifications of the vessel or her equipment (R. p. 92), and in most cases, at least, Mr. Green merely orally requested such bids (R. p. 113). The bids were all general in terms, and in every case based upon a guaranteed speed of twenty miles (R. p. 113. Claimant's exhibits 1, 2, 3, 4 and 5 and B, R. pp. 258-268, 288). We do not wonder that the trial court considered this evidence "unsatisfactory," and it would seem to us unnecessary to cite any authority to show that it was wholly incompetent. It is the first time we ever heard a claim made that such evidence is proper. Mr. Green, without appellant's knowledge, asked certain parties to tell him what they would reproduce the "Telegraph" for, guaranteeing a sustained speed of twenty miles, and he received certain general offers, not based on any specifications, but expressly based upon a guaranty of an almost impossible speed, and testified as to the range of these estimates. Appellant could not cross-

examine the parties receiving this request and giving these estimates; and neither it nor the court knows what considerations entered into the amount of these tenders. Appellee might have called the parties making these bids, as witnesses, as they were all available; but it did not do so, except Capt. Lovejoy, and two parties who had made estimates, upon which they supposed the subsequent bids were based.

Capt. Lovejoy, whose bid (Ex. B, R. p. 288), was \$86,500, admitted that he had no specifications upon which to base his bid; made his estimate "by comparison, principally," from his general knowledge of the "Telegraph"; he did not intend it as an absolute offer, but it was only "a pretty safe estimate," "subject to approval of the specifications"; and that when he got the specifications his bid "might be lower, you could not tell"; that this offer was a "rough estimate" of the cost of such a vessel (R. pp. 77, 78). He also admitted that this price was higher on account of the guaranty of speed required (R. p. 79).

W. S. Mathewson, estimator for the Seattle Construction & Dry Dock Company, one of the bidders, was called as a witness for appellee. He did not make the bid for that Company, and did not have any specifications of the vessel, except the

surveyors' specifications for *repairs after she was raised* (R. pp. 33, 100, Claimant's Ex. 6, R. p. 268, etc.); he simply estimated, from these repair specifications, and his recollection of the vessel from being aboard her *after she was raised* (R. p. 34), what it would cost to build a vessel "about as good as the 'Telegraph'" (R. p. 32). He did not remember what his estimate was (R. p. 103), but thought it was between \$65,000 and \$70,000 (R. p. 104), while that company's bid was \$92,400 (R. p. 287). At the time he testified he had no sufficient recollection of the vessel, nor of his estimate for her reconstruction, to more than guess at the cost of the different parts of the vessel (R. pp. 104-109). His testimony certainly can have no weight, nor do we think it competent.

Mr. Simen, superintendent of the Heffernan Engine Works, which bid \$79,600 for constructing a vessel similar to the "Telegraph," testified for appellee. He had only the repair specifications and his recollection of the vessel from his inspection of the wreck, to base his estimate upon (R. pp. 52, 118, 119). He did not make the bid, which was \$3,000 more than his estimate (R. pp. 119-120). His recollection was that he estimated the cost of the machinery at \$41,000 (R. p. 120); while Mr.

Mathewson, guessed the cost of the engine and parts to be about \$10,000 and boilers at from \$9,000 to \$12,000 or \$22,000 for all machinery (R. p. 106); while Capt. Scott, who built the "Telegraph," testified it cost about \$12,000 to take out the old engines, buy and install the new ones (R. p. 60). Mr. Simen estimated the cost of the hull at \$33,000 (R. p. 120), while Capt. Scott testified it cost about \$15,000 (R. p. 59).

One of the bids received by appellee and testified to by Mr. Green, was a bid by Mr. Supple of Portland for the sum of \$72,500 (R. p. 258, etc.). This bid is the most detailed of any, but it was based upon and contained a guaranty of a speed of twenty miles per hour (R. p. 262). Mr. Supple's deposition was afterwards taken in behalf of appellant, to show the market for vessels like the "Telegraph," and he then testified "I could build as good a boat as the 'Telegraph' was when new for \$55,000, although my bid was for \$72,000, but I included in that bid about \$20,000 on account of the twenty-mile guaranty required" (R. p. 349).

The other evidence offered by appellee on this question was the testimony of Fred A. Ballar, a naval architect from Portland, and consulting engineer for appellee (R. p. 47). He had been on the

“Telegraph” only twice in two years before she sank, and had not investigated her for over two years (R. p. 41); yet from what he saw of her in Portland several years before and in riding on her three years before, and his examination of the wreck (R. pp. 41, 42), he testified that it would cost \$75,000 to \$76,000 to build such a vessel at Portland (R. p. 38); although Mr. Supple could do it for \$55,000.

A resume of the entire testimony produced by the appellee in this case, aside from the alleged value for monopolistic purposes, will show that it has been practically confined to an attempt to establish two points.

First. That the “Telegraph” was a vessel capable of making a speed of twenty miles per hour, which speed for that type and class of vessel was very unusual, and which they contend gave her a special value.

Second. The cost of building a vessel similar in type to the “Telegraph” that could make and maintain a speed of twenty miles per hour.

Mr. Green testified that he asked for tenders, or bids, based on a guarantee of twenty miles per hour (R. pp. 91, 93, 113).

It necessarily follows that, if appellee failed to establish that the "Telegraph" could make and maintain said speed, then all of the testimony which has been presented by appellee as to the cost of constructing a boat similar to the "Telegraph," except that such new boat should make twenty miles per hour, will be valueless in that it constitutes no evidence as to the cost of constructing a boat identical in all particulars to the "Telegraph," and capable of making the "Telegraph's" speed.

A vast amount of testimony was taken by both parties to show the speed of the "Telegraph." This testimony, as is usual in such cases, is conflicting. A careful study of it, however, will show that most of the witnesses testifying for appellee, while very positive in stating what speed they *thought* she could make, did not, as an actual fact, know what she could or could not do. It has all been guess work without any actual tests having been made to confirm their opinion. It is but natural that most of these witnesses are employees of appellee, which may, perhaps, have had some influence in coloring their views.

As against this evidence, appellants have produced the evidence of a number of disinterested witnesses, amongst whom was Gilbert H. Parker,

the former master of the "Telegraph," when she was at her best, and when she had the greatest speed. He stated that, in his opinion, the "Telegraph" could not make twenty statute miles an hour carrying legitimate steam (R. p. 129), and, in his opinion, that, in the race, during which she made her record time, and during which race she disabled herself, she was not making twenty miles per hour (R. p. 135). Furthermore, that she was not nearly as fast a boat at the time of her loss as she was when she was built, shortly after which this race took place.

Barney Dionne, former chief engineer of the "Telegraph," who was on the vessel at the time of the race, testified that in his opinion the "Telegraph" never did and never could make twenty miles an hour in dead water under any circumstances. If she ever made that time, it was only when she had a tide or current to help her to make the difference. He stated that he got out of the "Telegraph" all the speed she ever made, and the best she could make was between eighteen and nineteen statute miles per hour (R. p. 344).

Arthur Riggs, formerly master of the "Telegraph" when she was running on the Columbia River, testified to her speed as follows:

"The time I ran from Astoria to Portland in five hours and sixteen minutes against the current, but with the benefit of the flood tide from Astoria to a point between Cathalamet and Eureka, and if the distance from Portland to Astoria is 90 miles, the maximum speed under ordinary circumstances was between 18 and 19 miles an hour. I think this was in August, 1905."

We believe that a review of all the testimony adduced, bearing on the question of speed, will convince the court that appellee has failed to establish that the steamer "Telegraph" at the time of the collision was capable of making twenty miles per hour, and that, therefore, the testimony as to the cost of building a similar vessel, capable of making and maintaining that speed, is valueless.

## THE TRIAL COURT'S DECISION.

As we have stated, the trial court refused to accept the evidence of market value or evidence of cost of constructing a vessel like the "Telegraph," as furnishing "a fair guide to the determination of the award to be made" (R. pp. 355-356), and based its decision "upon the proposition of original cost, allowing for the difference of her upkeep and the natural fair depreciation of her hull, engines, house and equipment" (R. p. 356). The trial court did

not decide that the rule of market value is not the correct measure to be applied in this case; nor state any reason, as shown by the evidence, why this rule should not apply. It refused to accept appellee's evidence of cost of constructing a vessel like the "Telegraph," but did not decide whether or not evidence of such cost, less depreciation, would be the proper measure of damages in the case; although it stated that it was influenced by such evidence. It did not hold that the cost of original construction, less depreciation is the proper measure of damages in such a case, but based its decision on such evidence, influenced by the other evidence it discarded, as well as by evidence of an offer of compromise, which it stated was "possibly not a proper element to be considered by the court" (R. p. 356).

In short, it appears from the decision that the trial judge had the case under advisement for only three weeks during a rush to dispatch business pending before him in anticipation of his retirement from the bench on the following week and decided the case on a compromise basis, rather than deciding what rule of law was applicable, and what competent evidence had been introduced to base a judgment upon; recognizing that in so doing, neither party would be satisfied.

Nor was the trial court accurate in this treatment of the facts, for it stated that the "Telegraph" cost a minimum of not less than \$75,000 (R. p. 357), apparently overlooking the fact that this included the expense of discarding the original engines and installing new engines at a cost of approximately \$12,000 (R. p. 54).

The only evidence of the cost of building the "Telegraph" was the testimony of Capt. Scott, and his son. This son, C. D. Scott, testified that she cost \$75,000 (R. p. 13); which included the new engines (R. p. 15). At the time the vessel was built at Everett, and until Mr. Green purchased her, this witness was ticket agent for his company at Seattle. He had no personal knowledge of the cost of the boat (R. pp. 14-17), and his general, hearsay testimony could have no weight whatever.

Capt. Scott testified that he built the "Telegraph" at Everett in 1903, she was therefore nine years old when lost. She was built for speed and carrying passengers, and had little freight carrying capacity. After she was built, he made a number of alterations and changes in her. He testified as to her cost as follows:

"She cost a little over seventy-five thousand dollars, with the machinery I last put in, compound engines" (R. p. 54).

Q. That included the machinery that you bought from the O. R. & N.?

A. She did not cost that much at first.

Q. The total cost that you gave included the machinery which you bought from the O. R. & N.?

A. And the other; yes, sir.  
(R. p. 54).

Q. Captain, the "Telegraph" was built at the Sumner Iron Works at Everett, was she?

A. Yes, sir.

Q. And do you know how much the hull cost?

A. I do not. The hull and cabin was all built in one contract, but I really cannot say exactly what it was, but I think it was about \$15,000, something like that. I forget. I have not set this down. I used to know. I could have told you before, what all the boats I ever built cost, but I forget. I am in my old age, and I do not try to recollect like I did.

(R. pp. 59-60).

A. I bought them engines, the type first used in her, high compress-engines, and then I put in the new compound, and the boys figured that up, the bookkeeper, and it runs something like ten thousand dollars.

Q. That is for the new engines.

A. Yes, they were all new engines, well-built compound engines and everything fit.

Q. That ten thousand dollars included taking out the old engines and installing the new besides their cost?

A. Yes; my boy says it cost twelve thousand dollars; maybe they did.

Q. Could not have been over twelve thousand dollars?

A. Something like that.

(R. p. 60).

Q. Could you give any estimate of the entire cost of the furnishings, such as chairs, carpets, linoleum, etc.?

A. No, that was all down. I could not give it to you but it was all down; it was all right in there and they showed it to me when the boat was done each time. I forget what the price of that was, but I know the whole cost was footed up and it was that much money.

(R. p. 62).

Q. The cost of the engines then, that you were talking about was the cost of the new engines and old engines both?

A. Yes, sir.

Q. That included the cost of the old engines and the cost of the new engines?

A. I just simply throwed them out; gave them to some iron works for scrap.

Q. And this \$12,000 that you speak of, was that the cost of the new engines and the cost of both engines?

A. The cost of the boat in the first place with the old engines, you might call them, they were new then, they cost us as near as I recollect eight thousand dollars, and when we added the other that ran the cost up to over seventy-five thousand dollars. I did not get anything for these engines we put out.

(R. p. 66).

When Capt. Scott testified, he was an old man

whose memory was very faulty (R. pp. 60, 69), and as testified by Mr. Green, whose witness he was, "he was getting in his dotage." He could not remember the cost of the vessel's equipment, which Mr. Walker placed at from \$15,000 to \$20,000, out of his total estimated cost of \$75,000 (R. p. 21). Capt. Scott testified the hull and cabin cost about \$15,000; Mr. Walker's estimate was \$30,000 (R. p. 21), and the other witnesses were as high or higher. Capt. Scott placed the cost of the new engines installed at from \$10,000 to \$12,000, but admitted that it cost more to take out the old engines and install new ones, than it would have cost to put in the new engines in the first place (R. pp. 60-61). He did not give the cost of the boilers, which Mr. Mathewson estimated from \$9,000 to \$12,000 (R. p. 106). In fact, Capt. Scott's testimony as to the cost of the vessel is so general and indefinite, that it would seem to us entirely insufficient alone to base a judgment upon in this case. But even if this testimony be made the basis of the judgment, certainly the total cost of the vessel, including all subsequent alterations and the new engines, making a double set of engines, could not be taken as the original cost. If the engines had been changed a few more times, and the cost of the new engines added each time to the aggregate prior

cost, the figure would have gone over \$100,000, which manifestly could not be taken as the basis from which to figure.

The unreliability of the testimony of the venerable Capt. Scott is best evidenced by the statement of Mr. Green, who called him as a witness, that "Capt. Scott was getting to be a very old man; he was getting in his dotage" (R. p. 97). The witness himself admitted that he was an old man whose memory was very faulty (R. pp. 60, 69). That he was unable to remember that he was paid \$55,000 by Mr. Green for the two steamers and the route two years before is a strong indication of how unreliable his testimony must be of what it cost to build a steamer nine years before. This is especially so when it is recalled that many alterations in plans were made, the boilers were not accepted by the United States inspectors as originally installed, bands had to be put around them (R. p. 15), the original engines were removed and replaced by entirely new machinery (R. p. 65), besides the other minor changes involved.

If, however, the testimony of Capt. Scott is accepted as reliable, it is manifest that as in the amount which he testified to be the total aggregate cost of the steamer, viz., \$75,000, is included the

cost of the engines originally in the steamer, but subsequently removed, cost of and installing the new engines, cost of putting the bands around the boilers and other items of like nature which did not increase the value of the vessel, all such expenses should be deducted from the \$75,000 before the proper construction cost can be ascertained.

While Capt. Scott has testified that the expense of changing the machinery amounted to \$12,000 he has not testified as to cost of other items. He stated that the hull and houses cost \$15,000, and that the cost of the engines installed was \$12,000. Others of appellee's witnesses say that the boilers would cost \$9,000 to \$12,000 (Matthewson, R. p. 106), and the equipment \$15,000 (Walker, R. p. 21). The foregoing items comprise all the parts of the steamer, and aggregate \$51,000 to \$54,000.

We believe, therefore, that a careful review of his testimony will show that the original cost of this vessel, without the expense of the numerous changes made necessary through improper construction, would not exceed \$55,000.

As against using evidence of cost of construction as a basis of value, showing has been made that—

The "Telegraph" was an obsolete and out-of-date vessel (Wilson, R. p. 146).

The "Telegraph" is a "departure entirely and a freakish model" (Wilson, R. p. 156).

Such vessels as these are out of class on Pugst Sound (Wilson, R. p. 160).

She was a class of boat which the appellee was getting rid of and was building as rapidly as possible to take their places an entirely different class of vessels (Skinner, R. p. 185).

Appellee is building a different class of boats now; iron and steel boats, rather propellers. That class of boats seems to be taking the place of the old stern-wheelers (Capt. Gilbert H. Parker, R. p. 133).

The appellee are constructing new iron propeller steamers to put on these routes all the time, a class of steamers of a different type to the "Telegraph" (Gibbs, R. p. 204).

She was a boat that when originally built the inspectors refused to pass the boilers as built because the crown sheet was too high, or did not come down far enough, and the set bolts in the boilers were too far apart, so that the inspectors would not pass it until four or five strips had been put around the boiler (appellee's witness Scott, R. p. 15).

She was a boat in which the original machinery was subsequently removed and a new set of engines put in its place (appellee's witness Scott, R. p. 65).

She was a boat in which the owners first cut off about eight inches of the bevel transom at her stern as it interfered with her backing, and subsequently cut off eighteen inches more, and further cut off eighteen inches of her bow (Barney Dionne, R. pp. 345-346).

She was a boat difficult to steer. Very few men can steer her on the Sound. She is apt to travel three miles out of every twenty winding around the Sound, trying to steer her (appellee's witness Smith, under cross-examination, R. p. 254).

She is not a practical vessel (Supple, R. p. 349).

This uncontradicted testimony shows how futile it is to attempt to place a value on this steamer based upon the cost of construction, less physical depreciation alone. To do so would be to absolutely ignore the depreciation in value which necessarily follows a vessel becoming obsolete in type, and further ignores the peculiar infirmities of the vessel, naturally detracting from her value as a commercially practical vessel.

Realizing the impossibility of establishing the

fanciful and excessive value which they are claiming by testimony as to what the actual value of the steamer was immediately before she was sunk, appellees have resorted to the only course left open to them of trying to prove a theoretical value by using as a basis what it would cost to construct a similar boat, and deducting therefrom a theoretical physical depreciation to arrive at the value immediately prior to this collision.

Witnesses for the appellee have testified that the depreciation on the "Telegraph" was as follows (Walker, R. p. —) :

Hull .....	25 per cent.
Machinery and boilers .....	10 per cent.
Equipment .....	25 per cent.

If Mr. Walker is correct that the "Telegraph" in nine years had only depreciated to that extent, then the hull was good for 36 years, and the engines and boilers for 90 years. Mr. Green placed the depreciation at from 15 to 20 per cent., giving her a life of from 45 to 50 years. To say the least, it is an absurdity on its face, and requires no further evidence in refutation than the already uncontradicted showing that in nine years she had become old and passed out of date. Much more acceptable, there-

fore, must be the testimony of Capt. Wilson of at least 50 per cent. physical depreciation. The trial court based its decision on a depreciation of 40 per cent.

It appeared that Capt. Gibbs, one of appellant's witnesses, had surveyed the wreck as the representative of the underwriters, and on cross-examination he was asked, over appellant's objection (R. p. 201), if he had not recommended giving appellee the wreck and paying it \$36,250 in settlement of its claim for loss of the vessel. We were very much surprised that proctor for appellee should ask such a question, or insist on an answer over our objection; as it certainly requires no citation of authority to this court to show that evidence of negotiations for settlement before suit are wholly incompetent and improper. Even proctor's statement that the question was "asked for the purpose of throwing light upon this witness' opinion of the value of the vessel" (R. p. 201), did not make the question proper. This was in no sense a statement by the witness contrary to his testimony, which would be admissible; but it called solely for evidence of what he recommended as a settlement of the controversy.

However, we think the witness' explanation of his recommendation, which was not disputed by

Mr. Green, shows the injustice of the award made in this case by the trial court. The witness stated that he made the recommendation because he thought there would be a liability for demurrage, and he wished to avoid the expense of litigation (R. pp. 201-203). He further stated that his recommendation was that *an offer made by appellee* to settle for that sum be accepted (R. p. 203). Appellee did not dispute that it made such offer, nor that it was then supposed there would be a claim for demurrage which was included in the offer; although, of course, no claim for demurrage has been or could be made in this case, where the loss is alleged and admitted to be total.

The trial court showed in its memorandum decision that it had not carefully considered the evidence. It not only made the mistake of saying that the offer of compromise was made by Capt. Gibbs, as against the evidence and the fact that the offer came from appellee to Capt. Gibbs, and was declined by him after consulting with his principals. The court speaks of the offer as \$37,500, whereas the uncontradicted evidence showed it to be only \$36,-250 (R. pp. 201-356).

While this evidence is improper, still, as it was brought out by appellee, and erroneously referred

to by the trial court, it is necessary for the facts to be correctly stated.

It would indeed be regrettable should this offer of settlement, made by appellee and declined by appellant, admittedly improperly introduced by appellee over our objection be considered by the court, and, on a mistaken idea of the facts, be interpreted to the advantage of appellee and to the detriment of appellant.

These errors as to the undisputed facts as shown by the record very clearly indicate the hasty and inadequate consideration which the trial court was able to give to this case in arriving at its conclusions.

The trial court refused to consider the amount paid by appellee for the "Telegraph" and "City of Everett" and the Seattle-Everett route a little over a year before the collision; also the insured value of the two vessels.

We do not contend that the price paid by appellee for the "Telegraph," taken alone, should be the measure of recovery in this case; but we do contend that such evidence was proper on the question of the market value of the vessel. Capt. Scott testified that he sold both vessels and the route to Mr. Green

for \$55,000 in the fall of 1910 (R. pp. 57-58). He testified that the boats were making money, from \$30,000 to \$42,000 a year, but that they wanted to quit and took appellee's offer, which was the best they could get (R. pp. 67-68). Mr. Green claimed the route was valueless, although admitting appellee had maintained it ever since, and he considered the route would become valuable. Certainly, if the route was worth holding, and these two vessels could earn from \$30,000 to \$42,000 a year on it, the route was worth something when it was purchased. Mr. Green claimed the "City of Everett" was "practically worthless" (R. p. 98), but she had been operated on the route ever since her purchase (R. p. 97), although the "Telegraph," which was a stern-wheeler, while the "City of Everett" was a propeller vessel, was laid up during the winter months (R. p. 97); and appellee had the "City of Everett" insured on a value of \$27,270, while it insured the "Telegraph" on a value of \$27,500 (R. pp. 95, 143). Capt. Scott testified that the "City of Everett" was a sound, good boat, when sold, and cost \$42,000 to build.

Mr. Green testified in respect to the purchase from Capt. Scott:

"A. And we made him believe it (on the inter-urban being built) would make him lose a lot of money in order to make him sell the boats cheap (R. p. 97)."

\* \* \* \*

"Q. You fooled yourself as well as the Captain?

A. Well not as badly as we did the Captain, I don't think (R. p. 97).

\* \* \* \*

"A. Captain Scott was getting to be a very old man; he was getting in his dotage" (R. p. 97).

In the face of this evidence, the thought naturally occurs that, if in their efforts to buy these boats and this route cheaply the appellee would fool old Capt. Scott, who was getting in his dotage, is it not possible that in their attempt to prove the damages sustained by the loss of the "Telegraph" they may likewise be trying to fool others as to her value?

All this evidence, we think, was competent as showing that the "Telegraph" was actually sold in the Seattle market for a price not exceeding \$25,000, the outside market value given by appellant's witnesses; and also shows that an award of \$45,000 as the value of the "Telegraph" alone, about a year later, was inequitable.

A large amount of testimony was taken by both sides to show the speed of the "Telegraph," as

her speed was the only ground upon which appellee claimed a right to recover a special value for her, and not her market value. It is apparent from the trial court's decision that it did not believe that the "Telegraph" was especially valuable on account of her speed; or that appellee could claim a special value on that account. We have no doubt that this court will reach the same conclusion after reading the evidence. To be the fastest stern-wheel vessel on Puget Sound, or even the Pacific Coast or the world, certainly does not place a vessel, used only for commercial purposes, in a class by herself, such as a racing yacht. Much less so when other similar but faster vessels could be purchased in the market and brought to the Sound to take her place; and especially as the only work she was capable of doing, i. e. carrying passengers, is being done now by a different class of vessels. As well might it be claimed that because an old sailing vessel had been or was the fastest of her kind, her value in case of her loss, would be her cost, or the cost of building like her, less physical depreciation, instead of her market value, because the demand for such a vessel would not be great. This certainly cannot be the rule, for in every case it would enable the owner to obtain a fancy price for a vessel he could buy for much less;

that had no special earning power for him, and that could not be sold for any such figure. We do not think the court will sanction such injustice.

## SUMMARY.

The following disinterested witnesses have testified to the actual value of the “Telegraph” immediately prior to her loss, as follows:

Capt. Chas. E. Wilson (R. p. 146).....	\$16,000
C. W. Cook (R. p. 315).....	20,000
Marcus Talbot (R. p. 339).....	25,000
Capt. S. B. Gibbs (R. p. 194).....	25,000

No testimony whatever has been adduced by appellee to disprove these values.

It is admitted by appellee that the purchase price of the two steamers and the route was \$55,000. The insured value of the “Telegraph” was \$27,500, and the “City of Everett” \$27,270. Is this not at least informative evidence of the correctness of the values testified to above?

If the “worthless” “City of Everett” (R. p. 98) had an insurable value of \$27,270, granting that the route purchased with her was “worth nothing” (R. p. 98), how is it possible to reconcile the

insured valuation of \$27,500 on the "Telegraph" with that on the "City of Everett?"

The pride with which Mr. Green speaks of "breaking his competitors" and his own business sagacity in so monopolizing the business of Puget Sound that, according to his own testimony, no route on which the "Telegraph" might be used was left to anyone, is hardly indicative of the fact that he would insure the two steamers on practically the same valuation if he did not consider them of the same value. It is a fixed fact in the case that the two steamers and the route were purchased for \$55,000. The route, despite Mr. Green's endeavor to belittle its worth, was valuable enough for him to ever after maintain his steamers upon. His own witness, Capt. Scott, testified that the "City of Everett" was in good condition when he sold her (R. p. 59), whereas, he says she was worthless and out of date (R. p. 98). In view of such testimony, how can it be consistently asserted that the insured valuations other than expressed the owner's ideas of the approximate actual values? It is safe to conclude that if there was a disparity in actual value, there would be a like disparity in the insurable valuations. The fact that the latter was for all practical purposes the same, is the best evidence as to

equality of the former. No stronger evidence is needed of the futility of attempting to conjure up the fictitious value now contended for by appellant.

The steamer "Telegraph" was not built by appellee for the special purposes of its business. She was purchased by it after she was an old vessel as a part of a transaction in which appellee acquired an established business and eliminated a competitor.

Under these conditions it is difficult to conceive of any grounds, either in equity or common sense, by which the theoretical basis, viz., cost of construction, less physical depreciation, could be used in determining the value of this steamer as against the positive and undisputed testimony of disinterested witnesses as to the actual value, the approximate correctness of which value is confirmed by the insured value placed upon the steamer by the appellee.

It is not contended by this appellant that this steamer or any other steamer has a market value in the sense that there is a market value for corn or wheat or other commodities bought and sold. That sales of vessel property are not as frequent as other classes of property, however, has not prevented the courts from recognizing that such sales as are made create and establish a market value. That the value

of the "Telegraph" as proved by the appellant in this case is such market value as comes within the rule of damages pronounced by the courts is confidently submitted.

It is true in this case that the "Telegraph" was sunk by the wrongful act of appellant. This act was wrong in law, but there is no claim that the act was intentional or malicious, nor are any circumstances shown or claimed which call for imposing upon appellant the burden of paying anything more than the fair value of the vessel, considered merely as property, and in view of what other vessels have been sold for. We feel that the testimony of Mr. Talbot and Captain Gibbs that they considered the value of the "Telegraph," when she sunk, as \$25,000 is very favorable to appellee. This figure would allow it nearly one-half what it paid for the two vessels and the route over two years before. It would allow it nearly all it valued the vessel for insurance purposes; it would enable it, if it so desired, to purchase the vessel from the present owners, repaired and as good as new, and still have \$6,000 in cash besides the vessel; and it would give the appellee as much as larger, better, faster and more practical vessels have been voluntarily sold and purchased for. If appellee secures

that amount, it is certainly all that in equity and good conscience it is entitled to, and we believe all that the evidence in this case would justify; while we feel that to allow appellee more, would be to punish appellant for a misfortune for which it is liable, but for which it should only be liable for such damages as the law and the testimony of fair, impartial and competent witnesses shows the value of the vessel was.

We respectfully submit that the trial court erred in finding the value of the "Telegraph" to be the sum of \$45,000, or any sum in excess of \$25,000; and that the decree should be reversed, and judgment ordered in favor of appellee for not to exceed \$25,000, with its interest and its costs in lower court, but with costs to appellant on this appeal.

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IN THE

**UNITED STATES**

**CIRCUIT COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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ALASKA STEAMSHIP COMPANY, a Corporation, Claimant  
of the Steamship "ALAMEDA,"  
Her Engines, Boilers, Tackle, Apparel and Furniture,

*Appellant,*

No. 2276

*vs.*

THE INLAND NAVIGATION COMPANY, a Corporation,

*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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**BRIEF OF APPELLEE**

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**INTRODUCTORY STATEMENT**

In this cause, the sole question before the lower court was: What amount of money will compensate the Inland Navigation Company for the loss of the

“Telegraph?” The District Court has said: Forty-Five Thousand Dollars and interest. The sole question before this court is: Is that amount excessive?

Shortly after the appellee was deprived of the “Telegraph” by the tortious act of the appellant it became apparent that the amount of compensation to which the appellee would be entitled for the loss of its vessel would have to be arrived at by judicial inquiry. It thereupon became the duty of the appellee’s proctors to investigate the conditions and to consider what data would best serve the court in determining the amount that would justly compensate the appellee for the said loss.

Keeping in mind that the question to be determined was: What amount will justly compensate the libelant for its loss—what amount will make it whole—we speedily saw that no evidence of market value could be secured that would be of any real assistance in its determination, and for these reasons: first, because there was no demand for fast stern wheel passenger vessels of the class of the “Telegraph,” and no frequency of purchase and exchange by which market value could be fixed or known. Second, because the “Telegraph” by reason of her speed and other characteristics was in a class by her self, and for various other reasons was of peculiar value to her owners.

Under these circumstances we felt that a witness in giving market value could only give the wildest

sort of guess or that his estimate would be as to what a speculator might bid in the market; or perhaps a purchaser who wanted to convert the vessel into a tow boat. Such values could be no criterion of The Inland Navigation Company's loss or fix its compensation, for it was deprived of a large fast passenger vessel operating on a regular run..

We felt also that like situations must have arisen and have been determined by the courts and that the authorities would show that in such circumstances market value cannot justly measure the damage, but that other circumstances such as the cost of building the vessel, its condition at the time of loss and the sum for which the vessel could be reproduced, less deterioration, must control, and this information we determined to furnish the Court.

It is not too much to say that the correctness of these preliminary observations have now been fully established and we shall show by extracts from the records and by citation of authorities. The appellant attempted to show a market and failed. Its witnesses estimated our loss by what they thought the "Telegraph" would sell for to someone who wanted a towboat, or who wanted to buy her for junk or what not. Yet, the appellant, notwithstanding this and notwithstanding the fact that the principles of law indicated above have been found to be sustained by the authorities, sought in the lower court and seeks here to fix our compensation

from that kind of evidence, though we have furnished the court with full, undisputed, and disinterested evidence from the most reliable sources, of the cost value, and reproduction value, less deterioration, of the lost vessel.

Our argument will proceed along the following lines.

1. The appellant not only failed to show such a market for vessels of the "Telegraph's" class as would tend to make her market value fixed and known, but actually proved that no such market existed; and its so called market value evidence throws no light on the question—What amount of money will justly compensate the Inland Navigation Company for the loss of the "Telegraph." ,

2. The law has always recognized the rule that where for any reason a vessel's market value cannot be established, that her value may be properly proven by other circumstances, such as cost of building and cost of reproduction less deterioration.

3. In this case the evidence of original cost and of what it would cost to reproduce her, less deterioration is so exact and clear and from such responsible sources that in the absence of any reliable evidence of market value, it furnishes the only true criterion from which to estimate the value of the "Telegraph" and fully sustains the Decree of the Court below.

## ARGUMENT

**THE APPELLANT'S EVIDENCE AFFIRMATIVELY SHOWS THAT THERE WAS NO MARKET VALUE FOR THE "TELEGRAPH," AND FURNISHES NO CRITERIA FROM WHICH APPELLEE'S LOSS COULD BE DETERMINED.**

This contention involves an examination of the appellant's attempts to prove a market value for the "Telegraph." Its first witness was Captain Gilmore H. Parker, a Master Mariner, who has been on the Sound since 1867. (R. p. 131.)

With regard to the value of the "Telegraph" he testified as follows:

**Q.** What in your opinion would be the reasonable value at Seattle in April, 1910?

**A.** I could not give any idea at all. (R. p. 133.)

On direct examination he testified at length as to where and for what purposes the "Telegraph" might be used, and in cross-examination testified as follows:

**Q.** Would there be any bidders or purchasers for such a boat other than those who wanted to use her for passenger business?

Mr. Merritt. I object as not proper cross-examination.

**A.** Well, not unless you make a towboat out of her, she would make a good, powerful boat (R. pp. 137-138.)

He further testified as follows:

You are familiar with the passenger traffic on the sound in general?

A. Yes sir.

Q. You do not know of any route upon which the "Telegraph" could be used that is not occupied by some line?

A. I do not know of any.

Q. Would there or would there not be any market value for the "Telegraph" unless that value was established by some one that had a route to use her on.

Mr. Merritt. I object as incompetent, irrelevant and immaterial. The witness is not qualified to answer, and it is not proper cross-examination.

A. She would be of no market value on Puget Sound as a passenger boat only the way she is now operated as an extra boat by the company which owns her. (R. p. 142.)

As the "Telegraph" had not been operated since she was sunk it is only fair to assume that in answer to the last question Captain Parker meant as she was operated just previously to that event, by the then owner, the appellee here.

#### TESTIMONY OF APPELLANT'S WITNESS CHAS. E. WILSON

The appellant's next witness on the question of market value was Captain Charles E. Wilson, whom

the appellant characterizes in the summary to its brief: as a "disinterested" witness. He confesses that he is known on the water front as "Cyclone" Wilson and openly avows his enmity to the President of the Appellee Company. (R. pp. 170-172.) This alone would vitiate his evidence, but a full reading thereof will show that it is altogether unworthy of any serious consideration, it being mostly hearsay and sailors' talk. However, as he was the star expert in market values, we quote illustrative excerpts from his testimony along that line. It is best introduced by the following statement from his cross-examination.

"I never sold a stern-wheel boat in my life."  
(R. p. 169)

How unfamiliar he was with the "Telegraph" is shown by the following from his examination in chief.

Q. Did you know the Steamer "Telegraph" before she was sunk?

A. Yes sir.

Q. Were you somewhat familiar with her and knew how she was constructed?

A. Oh, I knew more or less of that vessel from the time they started to build her; took considerable interest in her. Of course, it was the subject of conversation among marine men. I knew the engineer very well that worked on her and we stopped at the same house part of the time. (R. p. 145.)

Shortly after Captain Wilson had shown his utter want of real knowledge of the vessel he gave the following unique testimony in regard to the Seattle market and market values—testimony which appellant seriously contends measures the loss to The Inland Navigation Company of a large, fast, finely preserved and recently overhauled passenger steamer operating on one of the Company's regular runs.

Q. I will ask you whether or not in April, 1912, if there was a market at Seattle for vessels—stern wheel vessels?

A. Why there is always some market for anything, even a jack-knife out of your pocket if you sell it cheap enough. But vessels of that class I would say are obsolete and out of date, but she surely would have brought something. (R. p. 146.)

The appellant's proctor it would seem from his next question had about the same idea of market value as his witness Wilson; and this idea that appellee's loss is measured by the vessel's junk value or "speculative" value, or the price she would bring, if she would bring any price at all, he maintains throughout the whole case.

Q. If she had been offered for sale at Seattle, in April, 1912, before she sunk, in your opinion then, there would have been offers to buy her at some price?

A. Yes, I think some one would have bought her.

Q. You know as a matter of fact that she has been sold since she was sunk, the wreck has been sold?

A. Any vessel is worth something, if for nothing more than junk. (R. p. 146.)

Subsequently Captain Wilson in response to an inquiry about the fair reasonable market value of the "Telegraph" ventured an opinion that she was worth \$16,000.00, though he was doubtful about that and said that "the market is not a live one for that class of vessels." (R. p. 146.) Then follows lengthy hearsay testimony about sales of other boats of various classes and at remote times. And again appellant's proctor and his witness get back to the "junk" idea, the proctor inquiring whether if the "Telegraph had been offered for sale before she was sunk there would have been persons willing to buy her at some price who were not compelled to buy her," and the witness answers:

A. Yes there is no doubt of that, I seldom ever saw any vessel set on this market that could not be sold for a price to a junk man. They always buy them for something. (R. p. 154.)

We may say parenthetically that we have no doubt that in this respect the witness's testimony is true. We have never disputed that there is a market for junk in Seattle. Further light on Captain Wilson's ideas of markets and values is shown by the following extracts from his cross-examination:

Q. In other words Captain you do not think you could get in the market for a vessel of that class what she was worth?

A. No sir, I do not. (R. p. 159.)

And later along the same line he testified as follows:

Q. Do you not mean that the market, if there is such a thing as can be called a market, does not reflect the real value of the boat?

A. I would be pleased to answer any question I can in a fair way. Now, I would think that it is hard to answer that question. Such vessels are out of class on Puget Sound. On some rivers they use them. On the shallow rivers they are the best, but are usually lighter draft. Now, then there is a lot of real value in them, like an old automobile; they give good service, yet you can buy them for almost nothing; they are out of date, and there are not many people who desire that kind of an old vehicle or steamboat. (R. p. 160.)

The witness was asked if the market for passenger vessels was necessarily restricted. Along this line he testified as follows:

A. I would not consider for first class vessels in propellers, modern, up-to-date vessels, there is a market most of the time.

Q. I suppose you are familiar with the passenger traffic on the Sound here?

A. I ought to be in a general way, yes. In detail I do not know.

Q. Do you know any route upon which the Telegraph could be placed that is not already occupied by an established route?

A. I do not. That is you mean placed successfully in a business way?

Q. Yes?

A. No.

Q. That question would have an effect upon the market of course?

A. Why the economy of the ship has first to be considered, any one trying to make money anyway. (R. p. 164.)

But as a matter of fact did Captain Wilson attempt to give a market value, or is his system at arriving at values somewhat like the theory adopted by the appellee. Light is thrown upon this question by the testimony following.

Q. You testified that you made this estimate of \$16,000 taking into view her cost, the use to which she could be put and her depreciation.

A. Yes sir.

Q. When you made that estimate you made it on the belief that she cost \$46,000.00.

A. Yes sir. (R. p. 162.)

Subsequently he testified as follows:

A. I testified previous to this that the value should be based upon what the boat actually cost,

and their size; if they are similar boats one a third bigger would naturally cost about a third more.

Q. That is your primary element of value, what it cost to construct, of course taking other things into consideration?

A. Taking her original construction, the amount of money spent and if she is built upon the improved lines of construction and does not depart from that there must certainly be a definite value, and the more material you put in of the same quality and the more labor and stuff the more she will cost. (R. p. 168.)

Thus it will be seen that Captain Wilson did not attempt to give real market value, but arrived at his figures by an altogether different process, and one by the way which was based upon erroneous premises, since he "understood" that the original cost of the Telegraph was \$46,000. This by the way is characteristic of Captain Wilson's evidence as can be seen by reading it, for it is almost altogether made up of things he heard, or things he understood, or things someone else told him. It certainly does not tend to prove a market value for the Telegraph. It disproves it. And as for throwing any light upon the question of the amount of appellee's loss is of no value whatsoever, unless indeed, as the appellant seems to contend we are compelled to accept junk value for the loss of a well appointed passenger vessel.

## TESTIMONY OF APPELLANT'S WITNESS, GEORGE N. SKINNER

Mr. George N. Skinner who at one time had operated a boat in opposition to the "Telegraph" on the Bremerton run (R. p. 182) was the appellant's next witness. Appellant in its brief says; that Mr. Skinner testified that the Telegraph could have been taken to and used upon any of the inland waters of the coast and that in his opinion there was a market for her. (Brief p. 31) Mr. Skinner qualified himself for this kind of evidence in the following manner.

Q. Are you familiar with the different usage to which vessels of her kind can be put in Puget Sound and other waters?

A. I have absolutely no knowledge of the operation of stern-wheel boats. I have never been connected with the operation of a stern-wheel boat. (R. p. 178.)

As to the statement in the brief that Mr. Skinner testified that there was a market, it may be said that the Appellant's proctor labored faithfully to secure that result, but that the witness was evasive and nonresponsive. His attempts to get away from so testifying and his final success in so doing by fetching up at the "some value" idea of Captain Wilson is shown below.

Q. I will ask you whether or not from your knowledge of shipping on Puget Sound and other

waters where the "Teelgraph" might be used, there would be any market for a vessel of her kind at the time?

A. The "Telegraph" has been in service all the time that she has been on the Sound. She might have been laid up temporarily for short periods of time, but I think she has been in operation pretty nearly constantly since she came up here.

Q. She is a boat that could be operated on almost any of the lines on Puget Sound?

A. I think so.

Q. And, in your opinion would there be any market for a vessel of that kind at the time she was sunk?

Q. I do not know why, if Mr. Green could utilize her, if some one else had a place to put her, they could not operate her to the same advantage that he could operate her.

Q. Was there anything to stop any one putting another vessel on any of the lines on Puget Sound?

A. I imagine there would not be a market for her on the marked competition for that class of vessel at that time that there would be for a propeller boat, because they are a little out of date. They might, however, be better for some certain purposes than the propeller boat.

Q. Then, would there be any market, in your opinion—what would be your opinion about it, whether there would be any market for vessels of her class?

A. There is always a market for any type of vessel. Somebody has an idea that they can do better with a boat than the other fellow. It depends upon the price. I think the "Telegraph" would have some value on the Sound at any time." (R. pp. 180, 181)

It is submitted that this witness's testimony clearly shows that there was no market in the fair legal acceptance of the term for the steamer "Telegraph." He says: "It depends on the price." In other words his testimony merely goes to prove that the "Telegraph" would have sold for something. There is absolutely no indication that that "something" would at all compensate this appellee for its loss.

#### TESTIMONY OF APPELLANT'S WITNESS S. P. GIBBS

In the summary to appellant's brief on page 76 Mr. Gibbs is labeled as a "disinterested" witness. He was in fact the direct representative of the parties upon which payment of this loss will ultimately fall. (R. pp. 197, 201) He testified the "Telegraph" was built principally for speed and for passenger trade; and that he had never timed her speed. He testified that her fair reasonable market value was \$25,000. Captain Gibbs was asked a question framed almost exactly in the language used in a discussion of market value of vessels in the "H. F. Dimock" 77 Fed. 226, a case

which will be referred to in our subsequent argument. The question and the answer together with other testimony follows.

Q. Taking that into consideration, and the whole general condition surrounding the passenger traffic here, would say that the "Telegraph" fell within that class of articles which are sold from day to day, so that frequent, current market transactions would enable the owner, if he desired to sell, to obtain a fair value of her?

A. I do not think these transactions are taking place from day to day. It might be a case of holding a vessel for sometime before he could sell her.

Q. I say, taking a reasonable time. I will put the question in a shorter form. Is there such a market here, Captain, that if the Inland Navigation Company had placed this vessel on the market that it could within a reasonable time secure a fair value for her?

A. That would depend on what they call a fair value of the vessel. Vessels have sold of her class, frequently. The "Telephone" was sold over in Portland for \$24,800.00 and the "Charles R. Spencer," similar to the "Telegraph," licensed to carry 600 passengers, was sold for \$20,000.00, and it would appear to me that there must be a market for this kind of boats. You may have to hold them sometime before you find a purchaser.

Q. Well, in a sense, Captain, there is a market for everything. A. Yes, sir.

Q. As one of the witnesses has already testified in this case, that somebody would buy a vessel for junk at least. What I want to get at, is there

such a market and open enough, that is, are there sufficient bidders so that the price which would be realized in that market would fairly represent the value of that vessel?

MR. MERRITT. I object as calling for a conclusion of the witness as to the value. Our position is that the value of the vessel was the market value, if she had a market value, and it makes no difference whether that market value was what she would cost to build anew, or any other price.

Q. Captain, there are some articles for which there is a limited demand, and which may have certain special characteristics, which could not be sold in the market for their real value, are there not?

A. Yes, I presume there are.

Q. Did the "Telegraph" have a special value on account of her speed?

A. She had more value on account of her speed than a slow boat would have.

Q. Did she not, in your opinion, have a special value to the Inland Navigation Company, because of the fact that they owned so many routes upon the Sound?

A. I do not think I am in a position to pass on a question of that kind, as to what the value was to the Inland Navigation Company. I do not know what the value was to the Inland Navigation Company. (R. pp. 199-200.)

It will be noted that the Captain's evidence bears out our contention that there was no market for the "Telegraph" in Seattle which would reflect her real value or throw any real light upon the extent of our loss.

In the testimony given above Captain Gibbs testified as to sales of other vessels, but it is apparent that he procured his information by the correspondence method as shown by the following:

Q. Captain where did you acquire your knowledge about the sales which you have testified to; that is of the Spencer and the Telephone?

A. I wrote over to our surveyor at Portland and asked him to let me know of any transfers that had been made of stern-wheel steamers within the last year or two; and that I would like to know what they sold for; I have a copy of his letter in my pocket. (R. p. 201.)

Captain Gibbs is so far from being a "disinterested" witness that he is in fact the very man who surveyed the boat for the underwriters and recommended to them that they should pay the Inland Navigation \$36,250.00 and give them the wreck. (R. p. 201.)

#### TESTIMONY OF APPELLANT'S WITNESS, C. W. COOK.

The evidence of C. W. Cook was taken by deposition on interrogatories, and upon such cross-

interrogatories as we might guess would be appropriate to his answers. As appellant says in summary to its brief, he gave the reasonable market value of the Telegraph as \$20,000.00. His testimony, however, is qualified by the fact that he never made a minute examination of the Telegraph, but had seen her and known her in a general way; that at the time she was sunk he had not lived in Seattle for five years; and that when he left Seattle in 1906, that there was little demand for boats of the "Telegraph's" class. He further says that her chief value was as a spare boat; and that purchasers would be confined to persons who wanted her for passenger traffic; that he did not know of any possible passenger route on Puget Sound, where the Telegraph could be used which is not already served by an established passenger line; nor did he know of any established line operating on Puget Sound who would have desired to purchase the Telegraph on or about April 26, 1912. To cross-interrogatory Number Four inquiring if the market was active enough in Seattle to induce competitive bidding, he made no answer at all. And to cross-interrogatory Number Five asking him to give instances of sales in Seattle, naming the date, the vessel, her size and type, he made no answer. He testified that there was no demand at San Francisco, nor any on the Columbia River or the Willamette River for the "Telegraph." His testimony shows that the instances of sales given by

him were not within his direct knowledge; and that the particulars were acquired from others. (R. pp. 312 to 319.) We submit the testimony of this witness does not show a market value in Seattle, but tends to show that there was no market by which it could be fixed or known.

#### TESTIMONY OF APPELLANT'S WITNESS MARCUS TALBOT.

This evidence was also taken by deposition. He testifies that the "Telegraph's" value did not exceed \$25,000.00 and that his reason for so saying was that she was built to carry passengers at a fast speed and that at the time she was sunk she was unable to carry passengers at a fast speed. (R. p. 340.) The record is filled from cover to cover with evidence to the contrary. Everybody admits that the "Telegraph" was kept in first class shape and at the time she was sunk, that she was the fastest stern-wheeler on Puget Sound, and one of the speediest if not the very speediest steamboat of any kind on Puget Sound. Mr. Talbot was evidently testifying without competent knowledge. It will be noted also that he admits that there was no active market for the Telegraph in Seattle. He also says that her only purchasers would be those desiring her for passenger service; and that all the routes on the Sound have service; and that he did not know of any of these established lines on Puget Sound who would have wished to purchase her on or about April 26, 1912.

## TESTIMONY OF APPELLANT'S WITNESS, JOSEPH SUPPLE.

This evidence was also taken by deposition. Mr. Supple is a ship builder in Portland, and has been in that business there for twenty-five years. He says that at the time and place that the "Telegraph" sunk there was a market for stern-wheel vessels of normal type, but that the Telegraph was of a peculiar type of boat built only for passengers and not for carrying freight or towing; and that the demand for her would be for a strictly passenger run; and that if she had been offered for sale before she was sunk she could have been sold at "some price." He further testified as follows:

### Interrogatory No. 6:

"If you say there was such a market at said time and place, state what, in your opinion, was the fair, reasonable market value of said vessel at said time and place. In answering this Interrogatory, you will consider such value as the price which, in your opinion, said vessel would bring in said market if offered for sale by one who desired but was not obliged to sell, and was bought by one who was under no necessity of having it. You will also take into consideration all the capabilities of the vessel and all the uses to which it could be put, either at Seattle or elsewhere where said vessel could be taken and used. (R. pp. 328 and 329.)

Answering direct Interrogatory No. 6, the witness says: "Because of her peculiar type it is difficult for me to say what her market value would be." (R. p. 349.)

Be it remembered that all the foregoing is the appellant's own evidence. Its witnesses uniformly testify that the "Telegraph's" proper use was for the passenger traffic and admit that there was no demand for her on Puget Sound. Appellant's proctor argues at length that she might have been taken to other inland waters; but where? His witness Mr. Talbot of Portland, testified that there was no demand for her at San Francisco, or on the Columbia, or on the Willamette. (R. p. 318.) His witness, Mr. Skinner, says she would not even be available on some Alaska streams, or the Skagit River, or portions of the Columbia, or Willamette and is doubtful about San Francisco bay (R. p. 179). He thought, however, that she might be used as a towboat and that some one would buy her at "some" price.

In fact there is no one of appellant's witnesses who testifies that there was anyone who was willing to buy a large, well appointed passenger vessel such as the "Telegraph" admittedly was. Indeed their testimony is uniformly to the contrary. They do testify that some one would buy her at some price, a towboat man or a junk man or what not. Does that show a market for a passenger vessel? Obviously no, it shows a market for tow-boats and junk.

It seems to be appellant's position as shown throughout the examination of its witnesses that

if the vessel was put up for sale and would bring some price,—that that price would be the market price and measure our loss. And it did prove—as any one would have admitted—that she would have brought some price; but it did not show, or offer any competent evidence tending to show, what she would have brought on the market as a passenger vessel and surely, if market value measures the extent of our loss—and therefore the compensation, we are to receive—we are entitled to the market value of a passenger vessel for that is what we lost through the tortious act of the appellant. It did not prove such market price. How could it when it proved that there was no market? Nor is there a scrap of strictly competent evidence as to other sales of vessels of the “Telegraph’s” class though there is some evidence of sales of vessels of different classes at different times and places—most of it purely hearsay and such as could not be tested by cross-examination. As the lower Court points out in its opinion the testimony of these witnesses was not based upon their experience in the actual sales of vessels of the class in question at or about the time in question, or upon an intimate knowledge of the “Telegraph.”

“The market value of property is established when other property of the same kind has been the subject of purchase and sale to so great an extent and in so many instances that the value becomes fixed.”

*Sloan v. Baird*, 162 N. Y. 330.

"A price established by public sales in the way of ordinary business."

Am. & Eng. Encyclopedia of Law, 2d, Ed.  
p. 1153.

"The expressions actual value, market value, or market price, when applied to any article mean the same thing. They mean the price or value of articles established as shown by sales public or private in the way of ordinary business."

*Sanford v. Peck*, 63 Conn. 493.

The appellant argues that we did not controvert its so called evidence of market value. Of necessity we could not for we could procure no evidence of market value. We showed that there was no market by the testimony of one of the foremost builders and operators on the Sound, a man who has built and operated vessels for thirty-six years. (R. pp. 72-74.) And we showed the same fact by the President of the appellant company (R. p. 84). Doubtless we could have produced witnesses who would have made higher guesses as to what the "Telegraph" might have brought at a sale, than the appellant's witnesses did, for in mere matters of speculation men may be found of all shades of opinion, and it is scarcely to be assumed that the appellant, in choosing its witnesses happened to hit upon just these men who would give the very highest values for the Telegraph. Doubtless we could have found some one, some where, who would have made a higher guess. But this class of testimony would have been of no assistance to the Court.

**WHERE A VESSEL'S MARKET VALUE CANNOT BE SHOWN IN PROVING DAMAGES, HER VALUE MAY BE PROVEN BY OTHER CIRCUMSTANCES SUCH AS HER BUILDING COST AND REPRODUCTION COST, LESS PROPER ALLOWANCE FOR DETERIORATION.**

In the interest of brevity we will quote from some of the authorities with very little comment.

"There cannot be an established market value for barges, boats and other articles of that description, as in cases of grain, cotton, or stock. The value of such a boat depends upon the accidents of its form, age, and materials; and as these differ in each individual there could be no established market value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels."

*The Granite State*, 70 U. S. 210; 18 L. Ed., 180.

"But in the case of a ship adapted only for special purposes, and of such exceptional character as to be in fact unmarketable, some other criterion must be adopted. In these cases the Court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate, and the original price of the ship, its condition at the time of the loss, and the sum for which the plaintiff could have got such another ship built may be very important matters in the calculation."

Williams & Bruce's Admiralty Practice (2d Ed.) p. 97.

"While it is undoubtedly true that the best single class of evidence of market value is the opinion of competent persons who knew the vessel

and knew the state of the market at the time of the loss, it does not follow in any given case, because witnesses testify to certain facts, that either the commissioner or the court is shut up to their evidence without giving any heed to other kinds of evidence which may be offered. The cases cited by the appellant recognize equally the competence of evidence of the cost and deterioration as bearing on the amount to be allowed. Where from stagnation in the market at the time of the loss there is difficulty in fixing the precise market value, a resort to other modes of ascertaining it, especially where the vessel has been built but a few years, is at least allowable to be taken into account in arriving at a conclusion. The evidence shows that in 1877, when this vessel was lost, the market for sailing vessels was in a state of stagnation, and it was almost impossible to ascertain any actual sales which would furnish proper data or any criterion for the determination of the actual market value. The different values sworn to are after all but mere estimates, and not based on knowledge of similar sales in 1877. It is impossible, in such cases to determine the amount to be allowed with mathematical certainty. I do not find from the evidence sufficient reason to interfere with the result at which the Commissioner has in this case arrived."

*Leonard v. Whitwell*, 19 Fed. 548.

Appellant's proctor in his brief at p. 19 quotes from "The Lucille" and we follow his example herewith beginning our quotation at the very period where his quotation leaves off.

"While there is no criterion of market value furnished, and hence difficulty in fixing such value (as is the case here), a resort to other modes of ascertaining it is allowable. Evidence of the cost of

construction is admissible; but such cost is not of itself conclusive of her actual value at the time of collision. The whole cost should not be given as damages in assessing damages in a total loss, but evidence of the cost with deductions for deterioration may be properly resorted to in determining the value. *Leonard v. Whitwell* (D. C.) 19 Fed. 547; *The City of Alexandria* (D. C.) 40 Fed. 697; *The Mobila* (D. C.) 147 Fed. 882."

**The Lucille** 169 Fed. 719.

Again appellant's proctor at page 14 quotes from Marsden's Collisions at Sea (6th ed.) p. 101, concluding his quotation at the period before the following sentence:

"Her original cost, her condition at the date of her loss, money spent in upkeep, and her past earnings, have all to be considered."

Appellant also quotes from *The Mobila* at page 19 of its brief, but omits to quote the following:

"While evidence of the cost of the vessel is admissible, the cost plainly is not of itself proof of her actual value at the time she was lost. Full compensation for the loss is the rule in such cases, and it is to be measured by what it would cost to replace her."

**"The Mobila,"** 147 Fed. 883.

Again appellant on page 14 quotes from the Colorado, Fed. cas. 3029 to the effect that market value is the measure of damages, but fails to quote the following:

"There are, of course, exceptions to this rule, as when the vessel lost from some peculiarity of construction in order to adapt her to some special purpose out of the usual course of shipping precludes there being any market value for her. An instance of this may be when a vessel is built for a special trade requiring peculiar and unusual conditions in her construction. In such a case for want of a better criterion of value cost of construction or purchase price, with deduction for depreciation by ordinary wear and age may be resorted to."

Again on pages nine and ten appellant quotes from "Spencer on Marine Collisions," Sec. 200 ending its quotation just before the following paragraph:

"When the conditions are such that no market value can be shown, where there *is* no market value, or, if shown, it is so manifestly disproportionate to the intrinsic value of the vessel that to order a sale at such a price would be a hardship, the Court may adopt as the value of the ship the cost of construction with proper deduction for the deterioration in its value from the time of construction; especially may this method be resorted to if the vessel is but recently built."

"The Utopia" from which appellant quotes on page sixteen is nothing more than a commissioner's report; and in the *Laura Lee*, 24 Fed. 483 from which appellant quotes at length on pages fifteen and sixteen, it will be noted that the court finally arrived at the value by taking the building cost less depreciation.

See also *The H. F. Dimock*, 77 Fed. 226.

*La Normandie*, 58 Fed. 427.

The law unquestionably is that where there is no market value or where for any reason market value cannot be shown by reliable evidence that value may properly be proven by proving cost value or reproduction value less depreciation. And it is also the law that, even where there is competent evidence of market value, testimony regarding cost value and reproduction value less depreciation is properly to be considered.

**THE APPELLEE'S EVIDENCE FURNISHED THE ONLY TRUSTWORTHY CRITERIA FROM WHICH THE AMOUNT OF THE APPELLEE'S LOSS COULD BE ASCERTAINED AND IT FULLY SUSTAINS THE FINDING OF THE DISTRICT COURT.**

As previously indicated our contention is that the appellee, Inland Navigation Company, is to be compensated for the loss of a large well preserved, recently refitted, and very fast passenger steamer—usable on many of its routes which cover the entire Sound; and particularly useful on the Seattle-Everett route for which she was expressly designed and built.

She had in a marked degree the prime requisite of passenger vessels, that is, the ability to make great speed. She was the product of the veteran builder, C. D. Scott, who also built the "Telephone" mentioned frequently by appellant's witnesses as well as thirteen other vessels (R. p. 53). He testi-

fies that she was the "best I ever built," (R. p. 71) and that she was faster than the celebrated "Flyer" another of his successful boats. He says:

"I have always built for carrying passengers, and you have to go fast if you get the passengers. If a boat did not run fast she would not be worth anything to me and no man knows what it cost me in thinking nights and Sundays and weeks and months to get that speed with little power, and I have been doing it every time (R. p. 70).

### SPEED OF THE "TELEGRAPH."

The record is replete with evidence that the affectionate care bestowed upon the construction of the "Telegraph" by her builder was not without its reward. Captain Z. B. Murray who commanded her the two years immediately before she was sunk testified that in 1910, when not in the best of condition, she sustained a more than nineteen mile speed for eighteen miles and that she could make twenty miles an hour (R. p. 206). W. H. Gates, Chief Engineer of the "Telegraph" as late as December, 1911, only three or four months before she was sunk, testifies that they ran her right along under a cut-off at a seventeen mile gate, the wheel making twenty-six turns; that he had run her on occasions at thirty-two turns and that she would under such condition make twenty miles an hour (R. p. 214). H. Smith, another former chief of the "Telegraph" testified that when she beat the famous "Flyer" he had her making "about twenty-one miles an hour."

"Between twenty and twenty-one" (R. p. 221). This was made with the old engines, and C. Lake, another Chief Engineer, testified that she ran twenty to twenty-one miles an hour with her old engines (R. p. 284), but that he had charge of her for a number of months when she had the old engines and a number of months after the new were put in and that she maintained about the same speed after the change. (R. p. 227.) George Leach, another Chief Engineer( confirms the testimony of Captain Murray (R. p. 241). W. C. Roach was a first assistant on her, both before and after the new engines were put in and testifies that her speed was not lessened by the change. He thought she could make twenty miles per hour. (R. p. 246.) Captain H. H. MacDonald was mate with Captain Murray when he had charge of her and confirms his testimony. (R. p. 25.)

We think that there can be no question that the fact is proven that the "Telegraph" at the time she was sunk was capable, running under a cut-off, of making, and was making an economical commercial speed of more than eighteen miles per hour and that put into good condition, as she would be for a builder's trial, she was capable of making not only twenty, but even twenty-one miles per hour.

Even appellant's witnesses admit her great speed, Arthur Riggs of Portland testifying that she made ninety miles at a speed between eighteen

and nineteen miles against the current from Astoria to Portland, but with the help of the tide part of the way. He does not say that he was trying to make a record or getting the most out of her. And this was under river conditions. Appellant's proctor asked Riggs whether the "Telegraph" was capable of making twenty miles an hour without the assistance of tide or current, to which he replied:

"I always thought she would in a short run. That is my opinion. I had an idea she would with favorable circumstances, and with plenty of water under her, but I don't know because we never timed her." (R. pp. 301-302.)

#### ORIGINAL COST OF THE "TELEGRAPH."

C. D. Scott, son of the builder of the "Telegraph" and connected with the company which built her at the time she was built and later its secretary and treasurer, testified that it cost \$75,000.00 to build the "Telegraph" without including architect's fees or anything of that kind. (R. p. 13.)

C. D. Scott, the elder, testified that she cost a little over \$75,000.00. Such price not including anything for his time or the time of a marine architect. (R. pp. 54-55.) That she was designed for speed, strong and well put together and that it "Would cost ten thousand dollars more today to build the same boat and outfit her the way that boat was" (R. pp. 55-56). To the cost given by Captain Scott a sum should be added for architect's fees amount-

ing to five per cent of the cost (R. p. 38). Appellant offers no testimony to contradict the above,—in fact its own witness, C. W. Cook says: the “Telegraph” cost from \$65,000.00 to \$75,000.00 (R. p. 316)—but attempts to make light of the evidence by referring to the advanced age of Captain Scott, a witness whose testimony we submit shows in its every line the intelligence, ability and sincerity of the man who gave it. Appellant also attempts to show that the figures include two sets of engines. Captain Scott testified that he got the first machinery at scrap prices (R. p. 54); that it cost but little to take them out when the change was made because he assisted in and directed the work himself. (R. p. 61.) The appellant forgets that as pointed out by Mr. Green in his testimony (R. p. 116) a vessel, especially, a speed vessel, is not completed when she goes into the water. Remodeling and changing of wheels, rudders and even engines must sometimes be done in order to get the most out of the vessel; and under the watchful eye of Captain Scott the cheap machinery was in this process taken out and compound condensing engines put in ,doing away with the necessity of carrying tons and tons of fresh water. These changes gave the boat her individuality as a very fast, economical and efficient vessel, and their cost was properly charged as a part of the cost of the boat because they made her what she was.

## REPRODUCTION COST.

Captain Scott and his son testified that the "Telegraph" cost in excess of \$75,000.00, without architect's fees. That the Scotts must have told the truth is indicated by the testimony in regard to reproductive cost of competent surveyors, and of the foremost, and the most reliable, ship builders on the Northwest Coast.

Mr. Frank Walker is a marine surveyor, naval architect and consulting engineer, forty-six years of age, apprenticed in his boyhood and has followed his profession, on the Sound for twenty years. He was generally familiar with the "Telegraph," had surveyed and examined her a number of times especially during the year before she was sunk, during a heavy overhauling. He testified that the vessel could be reproduced for Seventy-five or Eighty Thousand Dollars, plus a five per cent Architect's fee. (R. pp. 18-20.)

Mr. Fred A. Ballin (erroneously called Ballar in record) is a naval architect, consulting engineer and marine surveyor of Portland, Oregon, who served his apprenticeship in a shipyard from 1874 to 1877, later attending the naval academy in Berlin, and has practiced his profession for more than twenty years. His occupation has been the building and supervising the building of ships. (R. p. 37.) He is also a surveyor for a long list of marine insurance companies. (R. p. 43.) He had been

aboard of the "Telegraph" a good many times in Portland, (R. p. 37) and several years ago had measured her all up when he was building a stern-wheel boat for the Navy Yard Route. (R. p. 40.)

He testified that she could be reproduced in Portland for Seventy-five or Seventy-six Thousand Dollars without counting architect's fees. (R. p. 38.) That he believes such a vessel could be built at less cost there than in Seattle, (R. p. 47) and that it would cost several thousand dollars to bring her to Seattle. (R. p. 38.)

This testimony coming from men so conspicuously qualified to speak of these matters we felt would be convincing, but we did not stop there. We went to the original sources, the ship builders themselves.

Mr. Joshua Green, the President of the appellee company, asked for bids upon a vessel to duplicate the "Telegraph" from all the responsible builders in the Northwest. (R. p. 84.) This vessel was to be capable of an extreme speed of twenty miles per hour and a commercial speed of eighteen miles per hour; a vessel capable of the same speed as the "Telegraph" was known to be capable of making and which we have proved she was capable of making. (R. p. 114.) Bids were received from firms in Portland, Tacoma, Seattle, Everett and Port Blakely, in fact from all the large and well known shipbuilding firms in the Northwest.

The bid of the Everett Marine Ways appears in the record at Libelant's Exhibit B. They offered to duplicate the "Telegraph" for \$86,500.00. Captain Lovejoy, the President of the Everett Marine Ways, a vessel builder and operator for thirty-six years was a witness in the case. (R. p. 72.) He was familiar with the "Telegraph;" said that she ordinarily traveled at a speed of seventeen or eighteen miles and could make better than twenty miles an hour. (R. p. 76.) He prepared the estimate of the Everett Marine Ways and admitted that there was a margin in it on account of the speed guarantee, but said: "I would not think you could duplicate that boat for less than \$80,000.00, barring the guaranty." (R. p. 79.)

The bid of the Heffernan Engine Works of Seattle appears as Claimant's Exhibit No. 2. This company offered to duplicate the "Telegraph" for \$79,600. The Estimator for this concern, Mr. Simen, its Superintendent, was examined and cross-examined at length. He had had eight years experience on this line of business. He had thoroughly examined the "Telegraph," had made specifications and drawings and estimated that it would cost \$76,600 to duplicate her with furnishing any equipment (R. pp. 50-52). He says that he did not figure on a vessel with a twenty mile guaranty, but only on a vessel to duplicate the "Telegraph" (R. p. 124).

The bid of The Seattle Construction and Dry Dock Company appears in the record as Libelant's Exhibit A. The amount is \$92,400. In this case also the appellant had an opportunity to examine the estimator for the company, Mr. Mattheson, a Cumberland graduate with eight years drafting experience and four years as an estimator (R. pp. 30, 31). The witness had made a four hour examination of the "Telegraph" and had her specifications from surveyors. They appear in the record as Claimant's Exhibit 6, and as the Court can see are very full and complete. He also had notes taken by himself on the hull, timbers, spacing, planking, etc. (R. p. 101.) He says that he did not understand that his principals would have to guarantee a speed of twenty miles an hour (R. p. 102). He did not make up the amount of the bid, but furnished the cost estimate from which it was made. His own figures as reported to his principal did not include profit or overhead expenses and were in the neighborhood of Sixty-five to Seventy-five Thousand Dollars. (R. p. 104.)

The bid of Crawford & Reid of Tacoma appears as Claimant's exhibit No. 4. They agree to duplicate the vessel for \$87,250.00, expressly saying: "We do not care to guarantee speed."

The bid of King & Winge of Seattle appears as Claimant's Exhibit No. 5. They agree to build a duplicate of the Steamer "Telegraph" for \$86,000.

Joseph Supple of Portland made the lowest bid \$72,500.00 F. O. B. Portland. This appears in the record as Claimant's Exhibit No. 1.

The Proposal of Carlson Bros. of Port Blakely offers to build and equip for Sound service a stern-wheeler "Equal in all respects to specifications of Str. "Telegraph" for \$88,000.' "

Captain Scott made a pretty conservative estimate when he said, that at the time of the loss it would have cost Ten Thousand more to build the "Telegraph" than when he built her nine years before; that is, \$85,000.00. That is just about the average of the bids of all the firms in the Northwest qualified to build such a vessel.

Appellant had full opportunity to cross-examine the estimators for four of these concerns; and because they use different methods of segregation at times, appears to find them widely differing as to parts. But somehow they reach pretty nearly the same result and appellant will scarcely dare to charge bad faith on the part of practically all the reputable shipbuilders in the Northwest.

But the above figures would not include all the cost of reproducing the "Telegraph." If built on contract the appellee would have to bear the additional expense of hiring a man to check the builder and look out for its interests during construction (R. p. 83). The duplication would cost something in ex-

cess of \$80,000.00 taking the very lowest and most conservative bid given, and on the average of the bids more than \$85,000.00.

## DEPRECIATION.

The appellee bought the boat from Scott a couple of years before she was sunk. At the latter date she was nine years old. Scott says "She was in number one order when I sold her to Mr. Green, almost as good as the day she was built, not quite, there might be a little difference, but she was not rotten any place." "Everything about her was perfect." "We had carpenters there to do all that; everything was in fine shape." He says also that she was worth close to Seventy-Five Thousand at that time (R. p. 57). Later he says "she had depreciated very little because I overhauled her." "I put in everything new, anything that was a bit decayed about the deck or beams or anything. (R. p. 66.)"

Mr. Joshua Green testifies that when the vessel was sunk she was in first class condition and that her depreciation was fifteen to twenty per cent at the outside. She had had new engines and new shaft about three years ago and a thorough overhauling, new shaft and cylinder a year before she was sunk and such of the interior fittings, curtains, carpets, piano, dining room furniture, etc. as had become worn had just been replaced. (R. pp. 84-89.)

Mr. Frank Walker, whose very exceptional fitness to speak of such matters has been previously indicated, and who had several times surveyed the vessel says she was in fairly good condition. (R. p. 20.) He says her hull and woodwork had depreciated about twenty-five per cent and her machinery ten. (R. p. 21.) He testified in effect that the "Telegraph" was worth in excess of Sixty Thousand dollars as can be found by making the computation indicated on page 21.

Mr. Ballin also an exceptionally qualified naval architect and surveyor of long standing, testifies that the "Telegraph" was very well kept up. (R. p. 40.) He did not think the hull had depreciated more than 20 per cent. He says the machinery was about as good as new, but some depreciation on the boiler; that ten per cent would be fair taking a proportion between the engine and boiler. (R. p. 41.) The furnishings he thought had depreciated from twenty to thirty per cent. (R. p. 41.) His testimony would also give a value to the "Telegraph" at the time she was sunk in excess of Sixty Thousand Dollars.

Captain Lovejoy, a builder and operator on the Sound for many years (R. p. 72) says in answer to the question, "Was she well cared for?" "The best of care. I have ridden on her many times." He estimated her depreciation at fifteen per cent. (R. p. 74.) We respectfully ask the Court to consider the

qualifications of these three disinterested witnesses on this subject, as well as Mr. Green's. It comes from disinterested experts, well qualified to judge. It is disputed by no one, except by the biased and irresponsible "Cyclone" Wilson, who placed the depreciation on her upperworks at fifty per cent; and on her boilers at thirty or forty, giving no figures for hull or engine. (R. p. 148.) He arrives at the fifty per cent by guessing that the boat might last eighteen years, and dividing it by two, a method of computation adopted from him by the appellant's proctor in the brief—and by the way almost as novel a scheme of depreciation calculation as saying that a boat a third bigger costs a third more; another proposition announced by Captain Wilson. (R. p. 168.)

It will be noted in this connection that when appellant's proctor had Captain S. B. Gibbs, a competent marine surveyor on the stand shortly after he dismissed the garrulous Wilson that he sought no information from him as to the depreciation of the "Telegraph."

There are one or two other matters on which the appellant lays much stress, one on the price the appellee paid for the vessel. Captain Scott repeatedly testifies that she was worth \$75,000.00, when he sold her less than three years before she was sunk. (R. pp. 56, 57, 66, 67.) He testifies that he had no other route to put her on and that the

Interurban was coming into competition; that he was past eighty, and old enough to quit steamboating any way. (R. p. 69.) He testifies as follows:

Q. That is what you mean by saying in your opinion that her value was about \$75,000.00?

A. She was worth that, he could not have bought her for that if I had not wanted to quit or no body else. We wanted to quit steamboating to go South—but we did not go South. We had made money enough so as to afford to quit, that is the reason I gave them to Mr. Green almost, that is the truth of it."

Subsequently he says: "That did not decrease the value of the boats because we sold cheap." (R. p. 67.) At another place he says: "He could not have bought them for that if we had not wanted to quit—for that money or twice that." (R. p. 59.) This testimony, together with the other testimony in regard to the value of the boat fully warranted the lower Court in saying in its opinion:

"The circumstances of the purchase, however, as testified to by Mr. Scott, the seller, indicate that the boats were purchased by the libelant at much less than their going value, and I do not think that the respondent is entitled to any reduction in the damages to be awarded by reason of the good fortune of the libelant in purchasing the "Telegraph" for less than its value."

In the collection of remarks on pages 67 and 68 of appellant's brief supposed to be derogatory to the "Telegraph" headed by three from the ready

tongue of the pugnacious "Cyclone" Wilson, we find that from time to time certain improvements were made on the "Telegraph" such as compounding her engines, cutting off her stern and bow, etc. All these things no doubt increased the value of the vessel as she came to us. It will not do for appellant to insist on the appellee taking junk value for this vessel upon any such argument.

### CONCLUSION

This argument has already been drawn to greater length than, perhaps, the subject warrants and we shall speedily bring it to a close. The lower Court felt that we would not be satisfied with the amount of its award and we are not satisfied with it. After a full reconsideration of the subject in writing this brief we feel that that amount is inadequate to the extent of at least Ten Thousand Dollars. The lower Court, as the appellant points out in his brief (p. 70) evidently figured depreciation on the "Telegraph" at the rate of forty per cent—which sum is far in excess of the estimate given by at least three particularly well qualified, and entirely disinterested witnesses, and the result of this was that our loss was estimated at the inadequate amount of \$45,000.00. Under these circumstances, we must confess, that we have little patience with an appeal that seeks to render that amount still more inadequate.

That the "Telegraph" was in a class by herself is admitted by everyone. That she possessed a particular value on account of her great speed, especially to the appellee company, with its many routes on the Sound to protect from competitors, cannot be gainsaid. That she was especially built for its Seattle-Everett route is admitted. That there was not, in any fair legal acceptation of the term, a market for her, was proven even more convincingly by the appellant's evidence than by our own. That the price, the "some" price which some one, "junkman," or towboat man, or what not, would have paid for her and which appellant insists should measure our compensation—would not in fact have compensated us—is shown beyond a peradventure of a doubt.

Nor can there be any reasonable doubt that under the circumstances we adopted the method approved by the experience of the Courts in proving our damages. The decisions to this effect are numerous, clear and convincing.

Our evidence of cost, given by the builder, himself, is thoroughly sustained by the opinion of men like Walker, Ballin and Lovejoy, and by the bids of practically all the shipbuilding concerns in the Northwest; and furthermore is wholly undisputed. The evidence concerning depreciation was given by as competent marine surveyors as we or anyone could secure; and denied by no one save Captain Wilson.

We feel that the law and the evidence would amply sustain an award of an even larger amount of damages than we received at the hands of the lower Court, and respectfully pray that the amount of the award be not reduced one penny, but that it be increased by the amount of our costs expended in defending it against this appeal.

Respectfully submitted,

IRA BRONSON,

J. S. ROBINSON,

*Proctors for Appellee.*



No. 2289

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4

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ARTHUR H. BROWN, as Receiver of the First  
Trust and Savings Bank of Billings, Montana,  
Appellant,

vs.

AMERICAN BONDING COMPANY, OF BALTI-  
MORE, MARYLAND, a Corporation,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Montana.

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FILED

SEP 17 1913



No. 2289

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United States  
Circuit Court of Appeals  
for the Ninth Circuit.

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ARTHUR H. BROWN, as Receiver of the First  
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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Montana.

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# INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

M. BROWN, Esq., Solicitor for Defendant and Appellant,  
Billings, Montana.

Messrs. WALSH, NOLAN & SCALLON, Solicitors for Complainant and Appellee.  
Helena, Montana.

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*In the District Court of the United States in and for  
the District of Montana.*

IN EQUITY—No. 236.

AMERICAN BONDING COMPANY, OF BALTIMORE, a Corporation,

Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,  
Defendant.

Be it remembered that on the 25th day of March, 1912, the complainant filed its bill of complaint herein, which is entered of final record as follows, to wit: [1\*]

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\*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States in and for  
the District of Montana, in Equity Sitting.*

AMERICAN BONDING COMPANY, OF BALTI-  
MORE, MARYLAND, a Corporation,  
Complainant,

vs.

S. G. REYNOLDS, as Receiver of the First Trust  
and Savings Bank of Billings, Montana,  
Defendant.

**Bill of Complaint.**

To the Honorable Judge of the District Court of the  
United States, in and for the District of Mon-  
tana:

The American Bonding Company of Baltimore, a  
corporation, brings this its Bill of Complaint against  
S. G. Reynolds, as receiver of the First Trust and  
Savings Bank of Billings, Montana, and alleges:

That the complainant is, and at all times herein  
mentioned was, a corporation organized and existing  
under and by virtue of the laws of the State of Mary-  
land, and authorized to transact business in the State  
of Montana, and having its principal place of busi-  
ness and residing at the city of Baltimore, in the  
said State of Maryland.

That the first Trust and Savings Bank of Billings,  
Montana, is, and at all times herein mentioned was,  
a banking corporation, organized and existing under  
and by virtue of the laws of the State of Montana,  
and having its principal place of business and resid-  
ing at Billings, in said state.

That on the 14th day of June, 1910, the defendant S. G. Reynolds, who then was and still remains a resident and citizen of the State of Montana, was, by order duly made and given in an action wherein the State of Montana was plaintiff, and the said First Trust and Savings Bank of Billings, Montana, a corporation, was defendant, which said action was brought in the [2] District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, appointed receiver of all the property and effects of the said First Trust and Savings Bank of Billings, Montana.

That at the time of the institution of the said action and at the time of the appointment of the said receiver, the State of Montana was a creditor of said bank, and that it then had, and for a long time theretofore had had, a deposit in the said bank in the sum of Twenty-five Thousand Dollars, as complainant is informed and believes, and for the amount so on deposit the said bank was indebted to the said State of Montana.

That some time during the year 1908, the complainant, for a valuable consideration then paid to it, and at the request of the said First Trust and Savings Bank of Billings, Montana, executed and delivered to the said State of Montana its bond as surety for the said First Trust and Savings Bank of Billings, Montana, in the sum of Ten Thousand Dollars, wherein and whereby it understood, as such surety that the said First Trust and Savings Bank of Billings, Montana, would pay, upon demand, to the said State of Montana all sums deposited by it in or

with the said bank.

That prior to the said 14th day of June, 1910, the said First Trust and Savings Bank of Billings, Montana, became and thereafter remained insolvent, and on and prior to said date refused and had refused to pay and was unable to pay to the State of Montana any portion of the said sum of Twenty-five Thousand Dollars, or thereabouts, so on deposit with the said bank, as aforesaid, by the State of Montana.

That prior to the 15th day of December, 1910, such payments had been made upon the obligation due from the said bank to the State of Montana as that there remained due to the said [3] State of Montana from the said bank the sum of Ten Thousand Dollars, and that on said date the defendant herein, as receiver as aforesaid, issued his certificate to the said State of Montana, reciting the indebtedness of the said bank to the said State of Montana, a copy of which is hereto annexed, marked Exhibit "A," and by this reference made a part hereof.

That in view of the obligation of your orator to the said State of Montana, arising under its bond so executed as aforesaid, your orator paid to the said State of Montana, the said sum of Ten Thousand Dollars, whereupon it, the said State of Montana, by its State Treasurer and Attorney General, appearing as attorneys for it in the said cause so pending in the District Court of Yellowstone County, Montana, wherein the said State of Montana was plaintiff, and the said First Trust and Savings Bank of Billings, was defendant, assigned and transferred to your orator its said claim against the said bank

evidenced by the certificate aforesaid, and your orator is now the owner and holder of said claim and has succeeded and is subrogated to the rights of the State of Montana against the said bank.

That under the laws of the said State of Montana, the said state has, and at all times had, a preference right to be paid in full in preference to all other creditors of the said First Trust and Savings Bank, and that by virtue of the facts hereinbefore set forth your orator has a right to be paid the full amount of the said claim so evidenced by the said certificate in full, in preference to the claims of all other creditors.

That notwithstanding the premises, the said defendant S. G. Reynolds has refused and still refuses to pay in full the claim of your orator, or to pay the same at all, except as [4] dividends are declared, distributed and paid to the general creditors of the said bank, and then only in the same ratable proportion as all of the said general creditors are paid, and your orator further avers that it will be impossible to realize from the funds and property in the hands of the said defendant the full amount of all of the just claims against the said bank or any part thereof in excess of about sixty per cent, but your orator avers that the said defendant now has in his hands, as your orator is informed and believes, a sum sufficient to pay the claim of your orator in full.

That on the 9th day of December, 1911, by an order of the said District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, in which was pending the aforesaid cause in which the said S. G. Reynolds was

so appointed as the receiver of the said First Trust and Savings Bank of Billings, Montana, then duly made and given, the complainant herein was authorized to begin and prosecute an action against the said receiver for the relief herein prayed.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that it is adjudged that the complainant is entitled with preference right to be paid the amount of its claim, as [5] hereinbefore set forth, out of any funds which may come into the hands of the said receiver, and that the said defendant S. G. Reynolds, as receiver of the First Trust and Savings Bank be, by the Court, directed to pay to the complainant, out of any moneys in his hands, or which may come into his hands as receiver of the First Trust and Savings Bank of Billings, Montana, the sum of Ten Thousand Dollars, with interest thereon from the 14th day of June, 1910, and for such other and further relief as to the Court may seem just.

May it please your Honor to grant unto your orator a writ of subpoena of the United States of America, directed to the said S. G. Reynolds, commanding

him on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

WALSH & NOLAN,  
Solicitors for Complainant. [6]

United States of America,  
District of Montana,—ss.

T. J. Walsh, being duly sworn, deposes and says that he is one of the solicitors for the above-named complainant, and makes this verification for and in its behalf; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

Affiant further says that he makes this verification for the reason that none of the officers of the complainant corporation are or reside in the county of Lewis and Clark, State and District of Montana, wherein affiant is and resides.

T. J. WALSH.

Subscribed and sworn to before me this 19th day of March, 1912.

[Seal] J. R. WINE, Jr.,  
Notary Public for the State of Montana, Residing  
at Helena.

My commission expires Nov. 13, 1914. [7]

**Exhibit A [to Complaint].****RECEIVER'S CERTIFICATE OF PROOF OF  
CLAIM.**

#868.

Receiver's Office,  
Billings, Montana, Dec. 15, 1910.

This is to certify, that Elmer E. Esselstyn, as Treasurer of the State of Montana, has this day made legal and satisfactory proof that he is a general creditor of The First Trust and Savings Bank of Billings, Mont., to the amount of Ten Thousand (\$10,000.00) Dollars, and ..... cents, upon the following claim, to wit:

First Mortgage Bonds..... Dollars. Cents.

Time Certificate of Deposit No.

..... issued by the First Trust  
and Savings Bank of Billings,  
Billings, Mont.

Unpaid Draft No. ....

Protest Fees on Draft No. ....

Savings Account No. 1002, The

First Trust and Savings Bank  
of Billings, Billings, Mont.... 10,000 00

Interest on Time Certificate of De-  
posit No. ....

Unpaid Cashier's Check No. ....

Total..... 10,000 00

and he, or the lawful assignee of this  
claim, will be alone entitled to  
the dividends thereon.

**NO ASSIGNMENT OF THIS CLAIM, or any  
portion thereof, will be recognized in the payments**

of dividends, unless notice of such assignment is given to the Receiver and entered upon his books before such dividends are declared, as evidenced by his endorsement hereon. This certificate is to be surrendered to the Receiver upon the payment of the final dividend.

S. G. REYNOLDS,  
Receiver of the First Trust & Savings Bank of Billings, Billings, Montana. [8]

Billings, Montana, Dec. 15, 1910.

For value received I hereby assign the within claim to the American Bonding Company of Baltimore, Maryland.

ELMER E. ESSELSTYN,  
State Treasurer.

By ALBERT J. GALEN,  
Attorney General for Montana.

Witness:

S. G. REYNOLDS.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed Mar. 25, 1912. Geo. W. Sproule, Clerk. [9]

And thereafter, on March 25, 1912, a subpoena in equity was duly issued herein, which is entered of final record as follows, to wit: [10]

[Subpoena.]

UNITED STATES OF AMERICA.

*District Court of the United States, District of Montana.*

IN EQUITY.

The President of the United States of America,  
Greeting: To S. G. Reynolds, as Receiver of the  
First Trust and Savings Bank of Billings, Mon-  
tana.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 6th day of May, A. D. 1912, to answer a Bill of Complaint exhibited against you in said court by American Bonding Company of Baltimore, Maryland, a corporation, complainant, who is a citizen of the State of Maryland, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable GEO. M. BOUR-  
QUIN, Judge of the District Court of the United  
States for the District of Montana, this 25th day of  
March, in the year of our Lord one thousand nine

*American Bonding Co. of Baltimore, Md.* 11

hundred and twelve and of our Independence the  
136.

[Seal]

GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,  
SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above suit, on or before the first Monday of May next, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

[Seal]

GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy Clerk.

WALSH & NOLAN,

Solicitors for Complainant, Helena, Montana. [11]

Due service of the foregoing subpoena by S. G. Reynolds, as receiver of the First Trust and Savings Bank of Billings, Montana.

Dated Apl. 4, 1912.

S. G. REYNOLDS,  
By HATHHORN & BROWN,  
His Attorneys.

Filed Apl. 17, 1912. Geo. W. Sproule, Clerk.

[12]

And thereafter, on May 4, 1912, the answer of defendant was filed herein, which is entered of final record as follows, to wit: [13]

UNITED STATES OF AMERICA.

*In the District Court of the United States in and for  
the District of Montana.*

IN EQUITY SITTING.

AMERICAN BONDING COMPANY, OF BALTIMORE,  
MARYLAND, a Corporation,

Complainant,

vs.

S. G. REYNOLDS, Receiver of the First Trust and  
Savings Bank of Billings, Montana,

Defendant.

**Answer.**

To the Honorable Judge of the District Court of the  
United States for the District of Montana:

The answer of S. G. Reynolds, Receiver of the First Trust and Savings Bank of Billings, Montana, defendant, to the Bill of Complaint of the American Bonding Company of Baltimore, Maryland, a corporation, complainant.

This defendant now, and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said Bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer thereto, answering saith:

That he admits that the complainant, the American Bonding Company of Baltimore, Maryland, is and at all times mentioned in said Bill was, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to transact business in the State of Montana, and having its principal place of business and residing at [14] the city of Baltimore, and said State of Maryland, as alleged in complainant's Bill of Complaint.

Further answering this defendant says that he admits that the First Trust and Savings Bank of Billings, Montana, is, and at all times herein mentioned was, a banking corporation organized and existing under and by virtue of the laws of the State of Montana, and having its principal place of business and residing at Billings, in said State of Montana, as alleged in said Bill.

Further answering said Bill of Complaint this defendant admits that on the 14th day of June, 1910, this defendant, who then was and still remains a resident and citizen of the State of Montana, was by order duly made and given in an action wherein the State of Montana was plaintiff, and the said First Trust and Savings Bank of Billings, Montana, a corporation was defendant, which said action was brought in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, appointed Receiver of all the property and effects of the said First Trust and Savings Bank of Billings, Montana, as in said complaint alleged.

Further answering said Bill of Complaint this de-

fendant admits that at the time of the institution of this action, and at the time of the appointment of said defendant as Receiver, the State of Montana was a creditor of said bank, and that it then had, and for a long time theretofore had, a deposit in the said bank in the sum of Twenty-five Thousand (\$25,000) Dollars, as alleged in said Bill of Complaint, and for the amount so on deposit the said bank was indebted to the said State of Montana. [15]

Further answering said Bill of Complaint this defendant admits that some time during the year 1908 the complainant, for a valuable consideration then paid to it, and at the request of the said First Trust and Savings Bank of Billings, Montana, executed and delivered to the said State of Montana, its bond as surety for the said First Trust and Savings Bank of Billings, Montana, in the sum of Ten Thousand (\$10,000) Dollars, wherein and whereby it undertook as such surety that the said First Trust and Savings Bank of Billings, Montana, would pay upon demand to the said State of Montana, all sums deposited by it in or with said bank; that prior to the said 14th day of June, 1910, the said First Trust and Savings Bank of Billings, Montana, became and thereafter remained insolvent, and on and prior to said date refused and was unable to pay to the State of Montana, any portion of the sum that it owed said State at said time; but denies that at the time the said First Trust and Savings Bank of Billings, Montana, became and remained insolvent as aforesaid, that it owed the said State of Montana the said sum of Twenty-five Thousand (\$25,000) Dollars or there-

abouts, but it is admitted that at said time it owed the said State of Montana the sum of Ten Thousand (\$10,000) Dollars, and avers that before the said 15th day of December, 1910, the said State of Montana had drawn out of said First Trust and Savings Bank all the moneys that it had deposited therein except the sum of Ten Thousand (\$10,000) Dollars, and said defendant admits that on said last mentioned date said defendant, as Receiver as aforesaid, issued his certificate to the said State of Montana, reciting the indebtedness of said bank to the said State of Montana, and this defendant admits that the copy of said certificate annexed to the Bill of Complaint in this cause, is a true copy thereof. [16]

Further answering the said Bill of Complaint this defendant says that he is informed and believes, and upon such information and belief, admits that the said defendant has paid to said State of Montana the said sum of Ten Thousand (\$10,000) Dollars pursuant to said bond given to the said State of Montana, as alleged in said Bill of Complaint; and this defendant admits that upon such payment the said State of Montana assigned and transferred to said complainant its said claim against said bank as evidenced by the certificate aforesaid, and that the said complainant is now the owner and holder of said claim, and has succeeded to the rights of the State of Montana against said bank, as alleged in said Bill of Complaint.

Further answering said Bill of Complaint this defendant denies that under the laws of the State of Montana, the said State has, and at all times had, a

preference right to be paid in full in preference to other creditors of said First Trust and Savings Bank of Billings, Montana, and that by virtue of the facts alleged in said Bill of Complaint or otherwise the said complainant has a right to be paid the full amount of said claim so evidenced by said certificate in preference to the claims of all other creditors, as alleged in said Bill of Complaint.

Further answering the said Bill of Complaint this defendant says that he admits that he has refused and still refuses to pay in full the claim of the complainant, but alleges that he has paid the said complainant a dividend upon said indebtedness of twenty per cent, and that he is ready and willing as fast as he is able to make dividends from the proceeds belonging to said First Trust and Savings Bank of which he is receiver as aforesaid, to continue to pay dividends upon said [17] sum of Ten Thousand (\$10,000) Dollars, but he avers that it is doubtful whether he will be able to pay the sum of Sixty (60) per cent upon said claim of said complainant, or even that amount.

Further answering said Bill of Complaint this defendant says that he admits that he has a sufficient amount of money in his hands to pay the entire claim of said complainant, but that if he does so it will be to the detriment of all of the other creditors of said First Trust and Savings Bank, of which he is receiver.

Further answering said Bill of Complaint this defendant admits that said complainant was authorized to begin to prosecute an action against said receiver

for the relief herein prayed, as alleged in said complainant's bill of complaint.

And this defendant denies that there is any other matter, cause or thing in said complainant's said Bill of Complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied is true to the knowledge and belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

S. G. REYNOLDS,  
Defendant.

HATHHORN & BROWN,  
Solicitors for Defendant.

Filed May 4, 1912. Geo. W. Sproule, Clerk [18]

Thereafter an order substituting party defendant was made herein, as follows, to wit:

[**Order of Submission and of Substitution of Party Defendant.]**

*In the District Court of the United States, in and for the District of Montana.*

No. 236.

AMERICAN BONDING CO.

vs.

S. G. REYNOLDS, Receiver.

This cause came on regularly for hearing at this time upon the Bill and Answer in said cause, T. J. Walsh, Esq., appearing on behalf of the complainant, and M. Brown, Esq., on behalf of the defendant, and, after argument of counsel, cause submitted. By consent of counsel A. H. Brown substituted for S. G. Reynolds as defendant and receiver herein.

Entered in open court, February 6th, 1913.

GEO. W. SPROULE,

Clerk. [19]

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And thereafter, on March 25, 1913, Decree was entered herein, which said decree is entered of final record as follows, to wit:

*In the District Court of the United States in and for the District of Montana.*

AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,  
Complainant,

vs.

**A. H. BROWN**, Substituted for S. G. REYNOLDS,  
as Defendant and as Receiver of the First  
Trust and Savings Bank of Billings, Montana,  
Defendant.

**Decree.**

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:.

That the complainant is entitled to recover from the First Trust and Savings Bank of Billings, Montana, and from the substituted defendant, A. H. Brown, as receiver of said First Trust and Savings Bank of Billings, Montana, the sum of Ten Thousand Dollars (\$10,000.00), with interest thereon at the rate of eight per cent per annum from the 14th day of June, 1910, amounting in all to the sum of Twelve Thousand Two Hundred Twenty-two 20/100 Dollars.

It is further ordered, adjudged and decreed that the complainant is entitled to be paid in preference to all other creditors the said amount, together with accruing interest thereon.

And it is further ordered, adjudged and decreed that the said A. H. Brown, as receiver of said bank, be, and he hereby is ordered to pay to the said complainant, out of any moneys in [20] his hands or which may come into his hands as such receiver of said First Trust and Savings Bank of Billings, Montana, in preference to all other creditors, the said sum of Twelve Thousand Two Hundred Twenty-two 20/100 Dollars, with interest thereon from this date

at the rate of eight per cent per annum until paid.

It is further ordered, adjudged and decreed that complainant do have and recover of and from the defendant receiver, its costs herein incurred, amounting to the sum of forty-five and 20/100 dollars.

Dated this 25th day of March, 1913.

By the Court.

GEORGE M. BOURQUIN,  
Judge.

Filed and entered March 25, 1913. Geo. W. Sproule, Clerk. [21]

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[Clerk's Certificate to Judgment-roll.]

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this Court.

Witness my hand and the seal of said Court this 25th day of March, 1913.

[Seal]

GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy.

[Indorsed]: Final Record, etc. Filed Mar. 25, 1913. Geo. W. Sproule, Clerk. [22]

That on February 11, 1913, the Court's decision was filed herein, being as follows, to wit:

*In the District Court of the United States, District of Montana.*

No. 236—IN EQUITY.

AMERICAN BONDING CO.,

Plaintiff,

vs.

S. G. REYNOLDS, Receiver,

Defendant.

**Court's Decision.**

Complainant seeks to recover a debt due the State of Montana from an insolvent bank of which defendant is receiver by virtue of appointment by a competent court on petition by said State by statutory authority, the debt being for public funds deposited in said bank by the State treasurer, for which complainant was surety, all by statutory authority, and which debt it paid. The funds of said bank are insufficient to pay all creditors. Complainant contends that public debts are entitled to priority in that the State having adopted the common law of England succeeds to or is vested with a like prerogative of the Crown.

Defendant contends that (1) the State has no such priority; (2) if it has it can not be asserted after the debtor's property has passed to a receiver.

This prerogative of the Crown or King of England is one of many attributes of sovereignty wherever it resides. The King, being the repository of the

sovereign power and authority, the supreme executive power and duty is vested with these prerogatives. They consist of certain rights, powers and privileges essential to the dignity of royalty or necessary to the general welfare of the entire community, and which are denied to individuals. The first are direct, the second incidental. They are dictated by [23] expediency, necessity and public policy. That here involved and like, are justified in that where the rights and interests of all the people meet those of one of them, the former is of more importance and must prevail.

The Crown's priority over subjects in payment of debts is to secure and conserve the revenues—the life-blood of the State, that the latter may be maintained in peace and war and its obligations discharged. It is of the incidental prerogatives and belongs to the King, not as an individual but *parens patriae*, or as universal trustee for the people. It is in fact a reservation or exception to the general course of law, in favor of the public or for its good. From its nature, its origin may be said to be higher than, superior to, and to antedate the common law,—of the fundamentals of all government. Its existence is suggested in Magna Charta, Coke notes that Littleton twice refers to it as the Law, Blackstone says it is out of the course of the common law, and while as a principle it enters into the British constitution, in Halsbury's Laws of England it is said that it is created and limited by the common law. But whether it is of those prerogatives that necessarily enter into the political being of every State and

so as much into ours as into that of England, or is of and created by the common law, it would seem to be of the law of Montana. The statutes of the latter provide that where they declare the law there is no common law. Otherwise, if not repugnant to, inconsistent or in conflict with the constitution or statutes of the State or United States and if of a general nature and applicable, the common law of England is and shall be the law and rule of decision.

Montana, R. S., secs. 3552, 8060. [24]

And so has been the law in Montana for more than forty years. There is no statute in this State relating to the priority of public debts. The rule of the common law in respect thereto is not objectionable in any of the particulars aforesaid. That it is of a general nature and applicable to the States's institutions cannot be gainsaid. That it is of general benefit and value, is evidenced by the fact that the United States and some of the States have established it by statute, but it is not clear the fundamental law of States is not so in the beginning and apart from statute. These statutes may be taken as approval of the principle of priority of public debts, as evidence of the rule's applicability, and as largely declaratory of inherent or common law. Since this prerogative of the Crown attaches to sovereign power wherever it resides (See Bank vs. U. S., 19 Wall. 239, U. S. vs. Hoar, Fed. Case 15,359), it must attach to Montana, a sovereign State.

U. S. vs. Bank of North Carolina, 6 Peters, 35, is not opposed to this conclusion. In that case there was involved a public debt of a particular class with

which Congress had dealt presumably with intent to establish a complete system in respect thereto. Under such circumstances the statute furnishes the only rule.

See *Bank vs. U. S.*, 107 U. S. 448.

It may be noted that the opinion of the Court in *U. S. vs. Bank of North Carolina*, *supra*, was delivered by Justice Story, who earlier on circuit decided *U. S. vs. Hoar*, Fed. Case 15,373, and therein gave full recognition to like prerogatives as inherent in the Crown and States, needing no statute to establish or effectuate them.

Be it as it may, however, I am persuaded there is no escape in reason from the conclusion that by adopting the [25] common law, Montana adopted the prerogative rule of priority of public debts.

That the law may not have been heretofore invoked is not considered important. Many laws, statutory as well as common, are quiescent for years, but are not thereby repealed or abrogated. No occasion to appeal to them may have arisen. The weight of authority and what seems to be the better reason is followed here.

Cases thereon may be found collated at 18 Cyc. 550, 36 Cyc. 871, 29 L. R. A. (N. S.) 226, 1 L. R. A. (N. S.) 255.

See *Carnegie Trust Co.* case, 136 N. Y. S. 466.

*Trust Co. vs. Ry. Co.*, 186 Fed. 291.

To contend that this valuable and necessary prerogative or right is arbitrary and discretionary and that none can complain if the State refuses to exercise it, is to contend it is discretionary with the

State's officers to enforce the law, discharge their duty, and conserve the revenues and interests of the people. If true where no one has a special interest therein, it is not true in respect to a surety who pays the State's debt and succeeds to the State's right or is entitled to subrogation.

This law of priority is not that of the ancient common law with all its rigorous methods of enforcement, but is that of the modified common law as it was when adopted by Montana. The right thereof can be exercised so long as the debtor's title to the property out of which it is sought to make the public debt, is not divested. And this is true whether the property is levied upon and seized in the debtor's possession, or is in *custodia legis* when the priority is asserted.

See Middlesex Freeholders' Case, 29 N. J. Eq. 268.

At common law even though another creditor has procured [26] levy and seizure of the goods of the King's debtor, at any time before sale under the writ the King's prerogative or priority prevails if asserted.

Although the bank here involved is in the hands of a receiver appointed on the State's petition, its title to its property has not been divested. While the receiver is statutory to the extent that he is appointed by virtue of statutory authority under circumstances not of themselves warranting the appointment by a court of chancery, yet he has no greater or other rights and powers than those of a chancery receiver for the statute creates none.

A court of chancery's receiver does not take title to the property involved but only possession as an officer of the court and to dispose thereof as the Court directs. The statute by virtue of which this defendant was appointed does not necessarily contemplate a winding up of the affairs of the bank. It is not dissolved and may resume.

The State has not waived its priority. The statute made it the duty of the State to petition for a receiver for the protection of all interested parties. Therein is nothing annulling the law of priority of public debts, and the discharge of this statutory duty is not inconsistent therewith.

When a court of chancery takes possession of property by its receiver, it is familiar law the owner's title is not divested, and in administration thereof the law of priorities and preferences govern in the payment of debts. Nor would the fact that the State received security from the bank seem to affect priority.

It is but a precautionary measure of value to the State, and injuring no one, the security to be primarily resorted to if the State pleaseth or for the State's protection if in the [27] exercise of its priority the bank's assets are insufficient to satisfy the State's debt.

If another for reasonable cause pays the debtor's debt to the King, at common law he succeeded to the King's priority. Formerly a creditor of the King's debtor could not sue him without first satisfying the King's debt, but having satisfied it, he succeeded to

the King's rights in respect thereto. And so is it by subrogation.

Complainant, surety for the bank, necessarily paid the latter's debt to the State and so succeeds to the State's right. It is entitled to recover here, and decree accordingly.

Feb. 11, 1913.

GEO. M. BOURQUIN.

Judge.

Filed Feb. 11, 1913. Geo. W. Sproule, Clerk.

[28]

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And thereafter, on June 12, 1913, assignment of errors was filed herein, being as follows, to wit:

UNITED STATES OF AMERICA.

*In the District Court of the United States for the District of Montana.*

AMERICAN BONDING COMPANY,

Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,

Defendant.

**Assignment of Errors.**

Now, on this 11th day of June, A. D. 1913, comes the defendant by his solicitors, Hathhorn & Brown, and says that the decree entered in the above cause on the 25th day of March, 1913, is erroneous and unjust to the defendant,

First: Because the Court erred in holding and deciding that the State of Montana was a preferred creditor of the defendant as receiver of the First Trust & Savings Bank of Billings, Montana, before it assigned its claim against the First Trust & Savings Bank of Billings, Montana, to said complainant;

Second: Because the Court erred in holding and deciding that the complainant, as assignee of the State of Montana, is a preferred creditor of said defendant as receiver as aforesaid, and entitled to recover in this cause the amount of money paid to said State by it, as alleged in the Bill of Complaint in this cause, and admitted in the answer;

Third: Because the Court erred in holding and deciding that said complainant is a preferred creditor of the said First Trust & Savings Bank of Billings, Montana, and entitled to recover from the defendant in this cause, as receiver, the sum paid by it to the State of Montana, as alleged in the [29] Bill of Complaint in this cause and admitted in the answer.

M. BROWN,

HATHHORN & BROWN,

Solicitors for Defendant.

Filed June 12, 1913. Geo. W. Sproule, Clerk.  
[30]

And thereafter on June 12, 1913, petition for appeal and order allowing same were duly filed herein, being as follows, to wit:

[Petition for Appeal.]

UNITED STATES OF AMERICA.

*In the District Court of the United States for the District of Montana.*

IN EQUITY.

AMERICAN BONDING COMPANY,

Complainant,

vs.

ARTHUR H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,  
Defendant.

PETITION FOR APPEAL FILED JUNE —,  
A. D. 1913, IN THE DISTRICT COURT OF  
THE UNITED STATES, FOR THE DISTRICT OF MONTANA.

To the Honorable GEORGE M. BOURQUIN, District Judge of the District of Montana:

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause on the 25th day of March, A. D. 1913, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and

papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California; and desiring to supersede the execution of the decree, petitioner here tenders a bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

M. BROWN,  
HATHHORN & BROWN,  
Solicitors for Defendant. [31]

[Order Allowing Appeal, etc.]

*United States District Court, District of Montana.*  
AMERICAN BONDING COMPANY,  
Complainant,  
vs.  
ARTHUR H. BROWN, as Receiver of the First  
Trust & Savings Bank of Billings, Montana.  
Defendant.

PETITION GRANTED AND APPEAL  
ALLOWED.

The petition hereto annexed is granted, and the appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of Fifteen Thousand (\$15,000) Dollars, with sufficient sureties to be conditioned as required by law.

June 11th, 1913.

GEORGE M. BOURQUIN,  
Judge of the United States District Court, for the  
District of Montana.

Filed June 12, 1913. Geo. W. Sproule, Clerk.

[32]

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Thereafter, on June 12, 1913, a stipulation was filed herein, being as follows, to wit:

*In the District Court of the United States, in and for the District of Montana.*

**AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,**  
Complainant,

vs.

**A. H. BROWN, Substituted for S. G. REYNOLDS,**  
as Defendant and as Receiver of the First  
Trust and Savings Bank of Billings, Montana,  
Defendant.

**Stipulation [Fixing Amount of Supersedeas Bond on Appeal].**

It is hereby stipulated by and between the parties hereto, through their counsel, that the supersedeas bond on appeal in this case may, and shall be, deemed duly fixed at the sum of fifteen thousand dollars (\$15,000.00), and that that sum will be deemed sufficient for the purpose of the bond.

Dated this 21st day of March, 1913.

**WALSH, NOLAN & SCALLON,**  
Solicitors for Complainant.

**HATHHORN & BROWN,**  
Solicitors for Defendant.

Filed June 12, 1913. Geo. W. Sproule, Clerk.

[33]

Thereafter, on July 12, 1913, Bond on Appeal was duly approved and filed herein, being as follows, to wit:

*In the District Court of the United States for the District of Montana.*

THE AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND, a Corporation,  
Complainant,

vs.

ARTHUR H. BROWN, Receiver of the First Trust and Savings Bank of Billings, Montana,  
Defendant.

**Bond [on Appeal].**

KNOW ALL MEN BY THESE PRESENTS, that we, Arthur H. Brown, as Receiver of the First Trust and Savings Bank of Billings, Montana, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to do business in the State of Montana, as surety, are held and firmly bound unto the above-named complainant, American Bonding Company of Baltimore, Maryland, in the full and just sum of Fifteen Thousand (\$15,000) Dollars, to be paid to the said American Bonding Company of Baltimore, Maryland, its attorneys, solicitors, successors or assigns, for which payment well and truly to be made we bind ourselves, our successors jointly and severally firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that

WHEREAS, the said Arthur H. Brown, as Receiver having taken an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the final decree rendered and entered in the above entitled action on the 25th day of March, 1913.

NOW, THEREFORE, the condition of the above obligation is such that if the above-named defendant, Arthur H. Brown, as [34] Receiver of the First Trust and Savings Bank of Billings, Montana, shall prosecute said appeal and shall answer all damages and costs that may be awarded against him, if he fails to make good his said appeal, then the above obligation is to be void; otherwise to be and remain in full force and virtue.

Sealed with our seals and dated this 1st day of May, in the year of our Lord, 1913.

ARTHUR H. BROWN, [Sea]

As Receiver of First Trust & Savings Bank of Billings.

UNITED STATES FIDELITY & GUARANTY COMPANY,

By CLINTON O. PRICE,  
Attorney in Fact.

[Corporate Seal]

[Indorsed]: No. 236. American Bonding Co. vs.  
A. H. Brown, Receiver. Bond. 7-12-13. Approved: Bourquin, J. Filed July 12, 1913. Geo. W. Sproule, Clerk. [35]

That on the 9th day of July, 1913, Citation was duly issued herein, which Citation is hereto attached and is in the words and figures following, to wit:

[36]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA.

To American Bonding Company of Baltimore, Maryland, Plaintiff, and to Walsh, Nolan & Scallon, Attorneys for Plaintiff, Greeting:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court, in and for the District of Montana, wherein American Bonding Company of Baltimore, Maryland, is complainant, and Arthur H. Brown, as Receiver of the First Trust and Savings Bank of Billings, Montana, defendant, an appeal has been allowed the defendant therein to the United States Circuit Court of Appeals, for the Ninth Circuit.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in said court, at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this 9th day of July, A.D. 1913.

GEO. M. BOURQUIN,  
District Judge.

Due and personal service of the foregoing citation is hereby accepted this 9th day of July, 1913.

WALSH, NOLAN & SCALLON,  
Attorneys for Complainant, American Bonding Company of Baltimore, Maryland. [37]

[Endorsed]: No. 236. United States District Court, District of Montana. American Bonding Co., Complainant, vs. A. H. Brown, as Receiver. Citation. Filed July 9, 1913. Geo. W. Sproule, Clerk. [38]

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And thereafter, on July 9, 1913, a praecipe for transcript on appeal was filed herein, being as follows, to wit: [39]

*In the District Court of the United States, District of Montana.*

No. 236.

AMERICAN BONDING COMPANY OF BALTIMORE, MARYLAND,

Complainant,

vs.

A. H. BROWN, as Receiver of the First Trust and Savings Bank of Billings, Montana,

Defendant.

**Praecipe [for Transcript of Record].**

The Clerk of said Court will please certify to the United States Circuit Court of Appeals for the Ninth Circuit, whatever papers are necessary in this cause to make the appeal to said Appellate Court perfect, to wit: Bill of Complaint, Subpoena in Equity, An-

swer, Decree, Court's Decision, Assignment of Errors, Petition for Appeal and Order, Bond on Appeal, Citation and Praeclipe, and Stipulation as to bond.

LOUD, COLLINS, BROWN, CAMPBELL  
& WOOD,

By MICHAEL BROWN,  
Attorney for Defendant.

Dated July 9th, 1913.

Filed July 9, 1913. Geo. W. Sproule, Clerk.

[40]

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[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 41 pages, numbered consecutively from 1 to 41, inclusive, is a true and correct transcript of the pleadings, process, orders and decree, decision of the Court and all other proceedings had in said cause, specified in the praecipe for transcript filed herein, as appears from the original files and records of said court in my possession as such clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Four 50/100 Dollars, and that same have been paid by appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 22d day of July, 1913.

[Seal]

GEO. W. SPROULE,  
Clerk. [41]

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[Endorsed]: No. 2289. United States Circuit Court of Appeals for the Ninth Circuit. Arthur H. Brown, as Receiver of the First Trust and Savings Bank of Billings, Montana, Appellant, vs. American Bonding Company of Baltimore, Maryland, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed July 26, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals,  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



5

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ARTHUR H. BROWN, as Receiver of the First  
Trust and Savings Bank of Billings, Montana,  
Appellant,  
vs.  
AMERICAN BONDING COMPANY, OF  
BALTIMORE, MARYLAND, a Corporation,  
Appellee.

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Brief of Appellant.

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STATEMENT OF CASE.

The American Bonding Company, of Baltimore, Maryland, appellee, is a Maryland corporation with its principal place of business at the City of Baltimore, and is authorized to transact business in the State of Montana. In the year 1908 the said Bonding Company for a valuable consideration

then paid to it by the First Trust & Savings Bank of Billings, Montana, executed and delivered to the State of Montana as surety for the said Bank, a bond wherein and whereby it undertook as such surety that the said Bank would pay upon demand to the State of Montana all sums of money deposited by the State in or with the said Bank.

The said First Trust & Savings Bank of Billings, Montana, at the date of the execution and delivery of the said bond, was a state banking corporation organized and then existing under and by virtue of the laws of the State of Montana, conducting a banking business at Billings, Montana.

Prior to the 14th day of June, 1910, the said Bank became and thereafter remained insolvent. Upon the 14th day of June, 1910, under and pursuant to the provisions of Chapter 141, Laws of Montana, 1909, in an action in the District Court of the 13th Judicial District of the State of Montana, in and for the County of Yellowstone, wherein the State of Montana was the Plaintiff and the said First Trust & Savings Bank of Billings, Montana, was Defendant, one S. G. Reynolds, was by an Order of said Court, appointed Receiver of all the property and effects of the said Bank to wind up its affairs. At the time of the institution of the said action and the appointment of said Receiver, the State of Montana was a creditor of said Bank by virtue of deposits theretofore made in said Bank by the State Treasurer of Montana pursuant to the

provisions of Section 183, Revised Codes of Montana, 1907. Prior to the 15th day of December, 1910, the Treasurer of the State of Montana drew out of said Bank all the moneys deposited therein except the sum of Ten Thousand Dollars; and on said 15th day of December, 1910, the Receiver, appointed as aforesaid, issued to the said Treasurer of the State of Montana a certificate reciting the indebtedness of the said Bank and that the said Treasurer of the State of Montana had made legal and satisfactory proof that he is a general creditor of said Bank to the amount of Ten Thousand Dollars (\$10,000) and that he or the lawful assignee of the claim would be entitled to the dividends thereon. (Record p. 8.) Thereafter the Bonding Company as surety, paid to the State of Montana the sum of Ten Thousand Dollars, whereupon the certificate of the Receiver as aforesaid was assigned to the said Bonding Company, the assignment having been executed in the name of the State Treasurer by the Attorney General for Montana. (Record p. 9.)

This is a suit in equity by the Bonding Company as Complainant, against the said Receiver as Defendant, to have said Bonding Company subrogated to a claimed right of the State of Montana to be paid in full in preference to all other creditors of said Bank. The funds and property in the hands of the Receiver are insufficient to pay the <sup>full</sup> amount of all claims against the said bank <sup>in</sup> excess of about sixty (60) per cent thereof. The

Receiver has in his hands a sum sufficient to pay the claim of the said Bonding Company in full but has refused and still refuses to pay the claim except as dividends are declared, distributed and paid to the general creditors of the bank, and then only in the same ratable proportion as all of the said general creditors are paid.

February 6, 1913, by consent of A. H. Brown, the successor of Reynolds as receiver, was by an Order of Court substituted for Reynolds as Defendant in the said suit.

The U. S. District Court for Montana decided that the State had a preferential right of payment and that appellee is entitled to enforce such right, and on March 25, 1913 a Decree for Complainant was entered, from which the Receiver has appealed to this Court.

The question for decision is whether the claim of appellee is a prior claim and should be paid before any other creditors of said Bank are paid.

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#### SPECIFICATION OF ERROR.

1. The Court erred in holding and deciding that the Apellee is entitled to be paid the sum of Ten Thousand Dollars, together with accrued interest thereon, in preference to all other creditors of said Bank.
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## BRIEF AND ARGUMENT.

### **I. The Common Law Prerogative of the King to Preference in the Payment of His Debts Is Not a Rule of Decision Applicable to the State of Montana As a Sovereign Power Since Neither the Constitution Nor Statutes of Montana Confer the Prerogative Upon the State.**

The District Court in its decision (Record, pages 22-23) has decided that under the common law of England the Crown possessed a prerogative as parens patriae to priority over its subjects in the payment of debts and that this rule of the common law is the law and rule of decision in Montana by virtue of the following sections of the Revised Codes of Montana, 1907, to-wit:

“Section 3552. Common Law, When Rule of Decision.—The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or Laws of this state, or of the Codes, is the rule of decision in all the Courts of this state.”

“Section 8060. No Common Law in This State.—In this state there is no common law in any case where the law is declared by the code or the statute; but where not so declared, if the same is applicable and of a general nature, and not in conflict with the Code or other statutes, the common law shall be the law and rule of decision.”

This conclusion of the District Court is further

predicated upon the fact that there is no statute in the State of Montana relating to the priority of public debts.

The laws of the State of Montana and of the State of Michigan in this respect are the same.

Zimmerman, Commissioner of Banking vs.  
Chelsea Savings Bank et al (Mich.), 125 N.  
W. Rep. 424, (Decided March 19, 1910).

In the case cited the Court says:

“Neither in the constitution nor in the statutes of the state is the right of the state to a preference and priority over other creditors distinctly asserted. If the right exists it is as a prerogative of sovereignty. Successive constitutions of the state have declared, generally, that the common law shall remain in force, and it is not doubted that by the common law of England it was a prerogative right of the sovereign, with some exceptions and limitations, to have debts due to him paid ahead of debts due to his subjects.”

In the Michigan case, supra, the Defendant bank became insolvent and was closed by the State Banking Commissioner pursuant to the statutes of the state. Thereupon a receiver was appointed. The American Surety Co. of New York, as Surety, and the Defendant, as Principal, had, prior to the institution of the action, entered into a bond to the Treasurer of the State of Michigan to secure the payment to the said state of all moneys belonging to it and deposited with the Chelsea Savings

Bank. After the Defendant bank became insolvent, the surety company, upon demand of the state, paid the face of its bond with interest, and thereupon intervened in the proceedings instituted by the state to liquidate the assets of the Chelsea Savings Bank, praying that the Receiver of the said bank be required to pay to intervener the sum so paid by it to the State of Michigan. The prayer of the intervener was denied by the Supreme Court of Michigan in the decision reported as above, and upon a rehearing of the said case (127 N. W. Rep. 351) the Supreme Court affirms its former decision and bases its conclusion upon the fact that "a royal prerogative is an arbitrary power vested in the executive, a power or will which is discretionary and uncontrolled;" and that since the State of Michigan had not exercised any prerogative right to priority of payment out of the assets of the insolvent bank "it is clear that no one may complain because the sovereign has not exercised a discretionary and arbitrary right." But the Supreme Court of Michigan also announces on the rehearing of the case a further doctrine as a basis for its conclusion, to-wit:

"We do not doubt that the state may provide by legislation for preference of payment of demands due to the state. The legislatures of some of the states and the Congress of the United States have to some extent given a preference to demands due to the Government. The right to do this is in-

herent in the state. It is exercised in this state, in a limited way, in the collection of the revenues. It has at all times been, as it now is, within the power of the legislature to make such provisions for state priority as seemed to be expedient. It has made none for cases like the one at bar. The form of our Government, the undoubted power of the Legislature in this behalf, furnish reasons for saying that in adopting the applicable rules of the common law as a part of the law of the state, the people did not adopt and thereby assert an arbitrary prerogative right to priority of payment of its debts, which was recognized by the common law.”

Under the authority of the Michigan case, *supra*, we contend that the common law rule conferring upon the sovereign a prerogative right to preference in payment of debts due the Crown is not a rule of decision in Montana, as neither the constitution nor the statutes of the state provide for any such preference.

Again, in the Michigan case, *supra*, (125 N. W. Rep. 429), the Court says:

“The funds of the bank, the possession of which is taken under this act by an officer of the state, are required to be paid as collected to the State Treasurer. There is no provision for retaining out of such funds moneys due to the state, excluding other creditors of such a bank. On the contrary, ratable dividends are to be made from time to time on all such claims as may have been proved.”

This is the law in Montana. The assets in the hands of the Receiver are to be divided pari passu among all creditors before the Court. Since the statute makes no distinction between creditors, the State of Montana as a creditor, or the Complainant here, if subrogated to its rights, must submit to the maxim that Equality is Equity.

The Courts of South Carolina and of Mississippi have both announced the rule in those jurisdictions to be that in the absence of constitutional or statutory enactments the state is entitled to no preferential right of payment out of the assets of an insolvent.

The State vs. J. M. Harris (So. Car.), 2 Bailey's Rep. 598;  
Klinck, Administrator, vs. Keckley, Executor, (So. Car.) 2 Hill's Ch. 256;  
Potter et al vs. Fidelity & Deposit Company of Maryland (Miss.) 58 So. 713.

In the case of State vs. Harris, supra, the Court says:

“The Sheriff is insolvent and it is contended that the state is entitled to be preferred to the other judgment creditors. The preference is claimed on the ground that in England it is a branch of the King’s prerogative; but it is one, which I rejoice to have it in my power to say, has not been extended to the state. \* \* \* If, however, it were a common law prerogative of the Crown, it does not follow that it has been transferred to the state. It can-

not be that the incidents of royalty are to adhere to the vestal of republicanism, when she has trod the diadem of kings under her feet and broken the sceptre of power. Monarchy is strictly a government for the benefit of the king. A republic on the other hand is a government for the protection of the citizen against the exercise of all unjust power. It is a government administrated by a few as the representatives of the people and for their benefit. With this as the cardinal object of the state government, it has no privileges but such as are conferred upon it by the constitution, by act of the legislature, or such as are necessary for the due administration of the government. I am free to confess that I should be little disposed to extend the exclusive privileges of the state as between her and her citizens. A strict construction of power and a strict limitation of its exercise are perhaps the best safeguards of the governed against the governors. That the state may by direct legislation give herself the preference claimed, is not denied, and the answer to the present application is that she has not given it.”

And again in Klinck vs. Keckley, supra, the Court says:

“The case of Commissioners of Public Accounts vs. Greenwood, 1 Eq. Rep. 450 (Decided in 1795 and never questioned) denied the general common law prerogative right of the king to be paid in preference to his subjects to have any application to the

state. In the State vs. Harris, 2 Bailey's Rep. 598, the same position was ruled. So that the right of the state to be paid in preference to other creditors depends now altogether on the statute law."

The Mississippi case, *supra*, was an action by the Fidelity & Deposit Company of Maryland against the receiver of an insolvent bank and in deciding the case the Court said:

"The whole question in this case is upon the right of the appellee to be subrogated to an alleged priority which it claims that the state has in the assets of the bank over the general creditors.

"The contention is that the state's debt constituted a trust fund and because the appellee company paid the state's claim it has the right to be subrogated to the state's right. In discussing this case we may state that if the state has any priority over the general creditors it must obtain it by virtue of some statute of the state or constitutional provision. In the absence of statutory or constitutional authority, the state as sovereign has no preferential rights in this state. This was settled as the law of this state when the case of *Shields vs. Thomas*, 71 Miss. 260, 14 So. 84, 42 Am. St. Rep. 458, was decided. But if the Court had not already set at rest this question, we would have no hesitancy in now declaring this to be the law. Some Courts have held the reverse of this. \* \* \* But we adopt the authorities which deny the state priority on any idea of sovereignty."

We contend that the Courts of Michigan, South Carolina and Mississippi have correctly stated the law and that since neither the statutes nor the constitution of Montana confer upon the State of Montana any right of preference in the payment of its demands out of the estate of an insolvent, neither the said State of Montana nor the appellee here is entitled to preference of payment from the assets of the First Trust & Savings Bank of Billings, Montana, in the hands of its receiver.

There is nothing in the case of Bank vs. U. S., 19 Wall. 239, and U. S. vs. Hoar, Fed. Cas. 15373 (incorrectly cited as 15359), cited by the District Court in its decision (Record, page 23) in conflict with the rule that the State of Montana is entitled to no preferential right of payment. The first of these cases was an action of debt to recover certain unpaid taxes and the Court held that the action could be maintained by virtue of statute. There is no determination by the Court of the rule of priority of public debts at common law and it was unnecessary for the Court to decide that question. The latter of the two cases was an action of assumpsit for money had and received brought by the United States against the Defendant as an Administrator. There is no discussion of the rule of priority of public debts at common law and the determination of the Court is that a plea of plene administravit was bad.

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**2. If, However, The Common Law Pre-rogative of the King, to be Paid in Prefer-ence to His Subjects, Ever Existed in Mon-tana, It Has Been Abrogated by the Provisions of the Revised Codes of Montana of 1907.**

Section 6214 of the Revised Codes of Montana, provides:

“The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.”

In the Civil Code of Montana provision is made with reference to the right of a debtor to prefer one creditor over another, and also with reference to the right of preference of certain creditors where an assignment is made for the benefit of creditors, and in proceedings in insolvency. The provisions referred to on these subjects are as follows:

“Section 6123. A creditor, within the meaning of this title, is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money.”

“Section 6124. In the absence of fraud every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.”

“Section 6125. A debtor may pay one creditor

in preference to another, or may give to one creditor security for the payment of his demand in preference to another.”

“Section 6140. In all assignments of property made by any person, association, corporation, co-partnership, chartered company or corporation, to trustees or assignees on account of inability of the assignor or assignors at the time of the assignment to pay his or their debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers employed by such assignor or assignors for services rendered within sixty days immediately previous to such assignment, not to exceed two hundred dollars for each person, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of such assignor.”

We submit that by the express language of Section 6214 the common law prerogative of the King to a preferential right of payment, if it ever existed in Montana, is abrogated by virtue of the enactment of the sections quoted above. Such sections establish the law of this state respecting the preference of one creditor over another.

Again, Section 6140 having provided that a certain class of creditors shall be entitled to a preference in proceedings to administer upon the estate of an insolvent, it would follow, by virtue of the rule *expressio unius, exclusio alterius* no other claims are preferred. It will probably be contended that a

general statute does not embrace the state, unless the state is mentioned. This, however, is merely a rule of statutory construction, and where it is apparent that it was the intent of the law making body to include the state, such intent will be given effect, although the state is not specifically mentioned.

Guarantee Title & T. Co. vs. Title Guaranty & S. Co., 224 U. S. 152.

The court in the case just cited held that the bankruptcy act of 1898 does not authorize payment to the United States in preference to all other creditors. In the opinion the court said:

“The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—national, state, and individual—and assigns the order of payment. The policy which dictated it was beneficent and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depend upon their daily labor. And to give such claims priority could in no case seriously affect the sovereign. To deny them priority would in all cases seriously affect the claimants.”

It is fair to presume that the legislative assembly of Montana intended, by Section 6140, to legislate with reference to all indebtedness of an insolvent, and that the omission to mention the state as a preferred creditor was not inadvertent.

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**3. If The Common Law Prerogative of the King to Preference in the Payment of His Debts Obtains As a Rule of Decision in Montana and Is Applicable to the State of Montana as a Sovereign Power, Still Neither the State of Montana Nor the Appellee Here Has Any Preferential Right of Payment Because Under a Recognized Exception to The Common Law Rule the Right of the Sovereign to Preference of Payment Dies the Moment the Debtor's Title Is Divested or the Property Passes Beyond His Control, Unless the Right Has Been Theretofore Exercised.**

The Board of Chosen Free-holders of Middle sex County vs. The State Bank at New Brunswick, 29 N. J. Eq. 268—Affirmed 30 N. J. Eq. 311;

Giles vs. Grover, 1 Cl. & Fin. 72—9 Bing. 128;  
State vs. Foster (Wyo.) 38 Pac. 926;  
State vs. Williams, 101 Md. 529—4 A. & E. Ann. Cas. 970;

Zimmerman, Commissioner of Banking vs. Chelsea Savings Bank et al (Mich.) 125 N. W. Rep. 424;

Hoke vs. Henderson (N. C.) 3 Dev. 17.

In the case of the Board of Chosen Freeholders of Middlesex County vs. The State Bank at New Brunswick, supra, the Court took possession of the State Bank at New Brunswick upon April 3, 1877, and appointed a receiver to convert its assets into money and distribute the same among its creditors

according to law. In January, 1877, the State Treasurer, pursuant to law, deposited nearly \$34,000 of the moneys of the state in this bank which stood to his credit as Treasurer when the bank suspended business. On the 7th of July, 1877, the Treasurer filed a petition in the Court appointing a receiver, alleging that the state was a preferred creditor of the bank and praying that the receiver be directed to pay the state's debt first in preference to other creditors. The Court said:

“The claim of the state rests upon a prerogative right of the Crown of Great Britain, the contention being that the state succeeded to all royal rights in virtue of its sovereignty when the crown was displaced here as the sovereign power. \* \* \* It stands on a common law maxim: *Quando jus domini regis et subditi concurrunt, jus regi praeferrri debet* \* \* \* The common method of enforcing this right is by writ of extent by which the debtor's body may be taken and also his goods and lands. \* \* \* In 1832 it was held by the House of Lords in conformity with the opinion of a majority of the law judges that the Crown's right continues as long as its debtor retains title, whether he retains possession of the property or the law has taken custody of it; it will over-reach a prior execution and levy but cannot reach property either partially or wholly aliened by the debtor. *Giles vs. Grover, 1 Cl. & Fin. 72; S. C., 9 Bing. 128.* It was also held in this case that the Crown's right must prevail against a judg-

ment creditor whose judgment execution and levy were antecedent to an extent in favor of the crown, because the seizure under the prior writ did not change the title, but merely put the property in custodia legis, for the benefit of those to whom the law would ultimately adjudge it; but it was unanimously resolved that if the debtor's title was divested before the teste of extent, the Crown's right against the property was gone."

The Court in the New Jersey case then proceeds to deny the existence of the common law prerogative in New Jersey by reason of the fact that for over one hundred years as an actual practical prerogative of government it has neither been exerted nor recognized. Continuing the Court says:

"But if my examination of the question had led me to a different conclusion, still, I think, the claim could not be sustained. The authorities of both countries unanimously agree that the right dies the moment the debtor's title is divested. No claim was made by the state in this case until after a receiver had been appointed. That appointment vested him with full power to sell, assign and convey all the property of the corporation. No act by the corporation is necessary to complete either the title of the receiver or that of his purchaser. On like proceedings under bankrupt law no assignment by the debtor or commissioners is required. Title is divested by force of law and such divestiture is perfect and absolute."

In the Wyoming case of State vs. Foster, *supra*, will be found an instructive discussion of the rights of the Crown at common law to have its debts preferred. Referring to the decision in the case of Giles vs. Grover, *supra*, decided in the House of Lords in 1832, the Court says:

“But the king had the right to pursue his remedy concurrently with the debtor even after the judgment of the latter and even after process had been issued and executed thereon, *if the title to the property remained unaltered in the debtor*; and the king’s process in such a case, although issued after the process of the subject, was entitled to preference. The proceedings by the sovereign and subject are aptly termed in the opinion of one of the judges ‘a race with the Crown.’ It was held that the sheriff holding the property of the king’s debtor seized under a fieri facias but not sold could not defeat the subsequent process of the king either by extent in chief, or in aid, which were in effect deemed the same, for the reason that, before the sale of the property seized under the *fi. fa.*, the title to the property had not been divested from the debtor, and the king’s process should have preference although subsequent to that of the subject creditor. It was conceded upon argument in the case and so held by the Court that the Crown could not avoid an equitable mortgage or the lien of a factor or of a wharfinger or of ‘*a bona fide assignment in trust for creditors.*’ \* \* \* And it

is undoubtedly the rule in England that the transfer bona fide of the debtor's property, while he has absolute dominion over it, defeats the king's prerogative right and his preference and priority are lost.  
\* \* \* The assignment of the insolvent's property both under the common law and under our statute passed the title; and no process could thereafter run against the property,—either that of the state or the citizen,—or the preference or priority right, if any existed, is thereby defeated."

The Maryland case of State vs. Williams, supra, is one in which the Home Fire Insurance Company of Baltimore became insolvent as a result of the great fire in the City of Baltimore, and upon bill filed Williams was appointed receiver to settle and close up its business. The State of Maryland, by its attorney general, filed a petition in the cause reciting the payment of certain premiums to insure public buildings destroyed by the fire and praying for the payment of certain sums to which the state was entitled in preference to all creditors of the Company. The Court said:

"We think the case of the State vs. State Bank, 6 Gill. & J. (Md.) 206, is decisive against the preference of the state. In that case the general principle upon which the preference or priority of the state over other creditors as against the property of a common debtor were very carefully considered in an elaborate opinion by Chief Justice Buchanan.  
\* \* \* The Court said: 'It is too late, therefore,

in this day to deny the state's right at common law to have its debt first paid *out of the property of its debtor remaining in his hands* and no lien standing in the way. For, notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principle or spirit of our political institutions. It does not indeed exist here with all the incidents to the royal prerogative right in England. We have not the writ of protection nor the extent in chief or in aid. And the priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid, where the individual creditor has no antecedent lien over-reaching it.' Judge Buchanan then proceeded to inquire whether that was a case in which the state's priority attached or whether it had been defeated by the act of the bank and in considering that action said: 'The debt due from the bank to the state is a debt on simple contract only and not a lien as must be conceded. The state, therefore, having no lien on the property covered by the debt of trust but a priority only in the payment of its claim, if that priority has not been lost, it is subject, claiming under the common law, to the same common law rule applicable to the royal prerogative right of priority in England of the same description. That right in England is enforced by the process in the writ of extent in chief, or in aid, according to the circumstances, and may be held by proceedings known to

our Courts. *But in either case to make it available, the proceedings must be resorted to before other vested rights to the property sought to be subjected to the claim are acquired.*' In support of this statement of the law he cites 2 Tidd's Practice, 1098-1099, where it is said: 'Where goods are bona fide sold or fairly assigned by the king's debtor to trustees for the benefit of its creditors before the teste of the extent, they cannot be taken under it even though in the latter case the debtor was a trader within the bankrupt law and the assignment was an act of bankruptcy.' And Mr. Tidd is sustained by the case of Braddock vs. Watson, 2 Exchequer C., page 6, and Giles vs. Grover, 1 Cl. & F. 72, cited and commented on by Judge Buchanan. In the latter case Lord Chief Justice Tindall states the controlling principle thus 'The actual sale of the property seized under the writ issued at the suit of the subject forms the dividing line so that where the sale is complete before the awarding of the crown process the property is protected therefrom, but where it is not completed, the property may be seized thereunder.' This language is in exact accord with the careful and accurate expression of Judge Buchanan when in the passage above quoted, he limits the state's priority to: 'The property of its debtor remaining in his hands.' And where in a later passage in the same opinion he says: 'If the property be fairly and bona fide changed, or the right of the individual creditor be completed before

the extent, either by sale under a fi. fa., or a valid conveyance to him, or to a trustee for his benefit, the extent coming afterwards will be unavailable, there being no point of time at which the two rights were in conflict and nothing for the extent to act upon after the property ceases to be the property of the debtor.' " (The italics ours.)

In conclusion, the Maryland Court in State vs. Williams, *supra*, says:

"We do not perceive any reason why any distinction should be made between the effect of such a conveyance as was made in the State vs. State Bank, *supra*, and the decree in this case based upon a bill praying the dissolution of an insolvent corporation, in which case the receivers appointed by a Court under Section 382 of Article 23, of the Code are vested with all the estate and assets of every kind belonging to such corporation from the time of their qualifying as receivers, and shall be trustees thereof for the benefit of the creditors of such corporation and its stockholders. For the reasons given we are of opinion the priority of the state was properly denied."

In the Michigan case of Zimmerman, Commissioner of Banking vs. Chelsea Savings Bank et al, *supra*, the Court says:

"Without treating the action of the Banking Commissioner in closing the Chelsea Bank as the precise legal equivalent of a fair and bona fide assignment by the bank of its assets for a valuable

consideration, it is nevertheless true that the proceedings taken passed all the property of the bank beyond its power or control. This being the result of enforcement of the state law should have an effect equal to an assignment for benefit of all creditors. Such an assignment could not be avoided by the Crown nor could it lay claim to goods seized by the sheriff on *fi. fa.* and sold (citing cases). The principle proceeded upon seems to be that the right of priority of the sovereign attaches, as does the right of any lienor, only upon seizure under or enforcement of the proper writ. We do not hesitate to say that, assuming the right of priority contended for to exist in this state, the Courts, in the absence of any assertion of the right by the state, and after the debtor has been divested of all control of its property in proceedings authorized by and following the statutes of the state, should not, *sua sponte*, assert the right in favor of a guarantor of the debtor.”

In the above cited North Carolina case of *Hoke vs. Henderson*, the Court says:

“If the subject hath sold the goods of the king’s debtor before the sovereign sues execution, the sale is not disturbed. It is no longer a question of preference of satisfaction, for the goods have ceased to be the debtor’s for any purpose.”

None of the following cases in any way qualifies or denies the existence at common law of the exception recognized by the foregoing cases to the rule

that the Crown is entitled to preference in the payment of its debts, to-wit:

In re Tyler, 149 U. S. 164;

Wise vs. L. & C. Wise Co., (N. Y.) 47 N. E. 788;

Central Trust Co. of New York vs. 3d Ave.

Railway Co. et al, 186 Fed. 291;

U. S. Fidelity & Guaranty Co. vs. Rainey et al  
(Tenn.) 113 S. W. 397;

In re Carnegie Trust Co. (N. Y.) 99 N. E. 1096.

There is nothing in the case of In Re Tyler, supra, or any authorities referred to in the Court's opinion that determine the question of the right of a sovereign state at common law to priority in the payment of debts due the state, or that lay down any qualification of the above considered exception to the rule. The only question determined is that a state even as against property in the hands of a receiver has a claim prior to all other creditors for taxes levied upon property; but this holding is based upon the fact that the statute created a lien upon the property.

In the case of Wise vs. L. & C. Wise Co., supra, the only question determined was whether taxes assessed upon personal property of a corporation and which became due subsequent to the levy of an attachment and execution thereon at the suit of creditors are a prior lien upon assets in the hands of a receiver for distribution. The right of preference was denied. The doctrine of this case is expressly affirmed by the Circuit Court of the United

States for the Southern District of New York in Robinsin vs. Mutual Reserve Life Insurance Co., 175 Fed. 624, where the Court says:

“In the case of the Columbian Insurance Company, where a preference was allowed, there was a lien for the taxes on the company’s property before receivers were appointed. In the case of Wise vs. Wise Co., where a preference was denied, the taxes became due after the levy of an attachment. The case under consideration differs from the first in that there was no lien for the state’s claim before receivers were appointed and from the second in that the state does not ask for a preference over any prior specific lien. But Judge O’Brien’s language in the latter decision seems to me to clearly exclude the state from any preference in this case over the general creditors.”

The case of Central Trust Co. of New York vs. 3d Ave. Railway Co. et al, *supra*, was an action by the Trust Company against the Railway Company and from an order on a claim by the people of the State of New York they appealed. The property of Defendant was in the hands of a receiver. The Court said:

“We regard it as settled law in this state that the state does not succeed as sovereign to all the prerogatives of the British Crown, among others the right to a preference for debts due it over all other creditors. It has been expressly held that taxes due the state have no priority of payment out of a fund

in Court for distribution unless the priority was expressly given by statute or unless the fund has come into the Court impressed with a priority for the tax."

The Court further said:

"The Circuit Court of Appeals for the 8th Circuit in the State vs. Central Trust Co., 94 Fed. 244, held the State of Minnesota to be entitled to priority of payment even out of personality of all debts due it over every other debt. This conclusion was rested upon the rights of Minnesota as a sovereign without reference to statute, which, as we have seen, is not the law of this state." (P. 294).

An examination, however, of the case referred to by the court, discloses the fact that the decision is based upon a statute and not upon any rights of the State of Minnesota as a sovereign, as will appear from the following language found in the opinion:

"In the case in hand it is not necessary to infer the existence of a lien for the taxes in controversy because of the character of the indebtedness, as has been done in some cases, since the state statute has in unmistakable language given a lien therefor upon all the personal property of the taxpayer owned by him when the tax lists are received by the County Treasurer." (P. 248).

The case of U. S. Fidelity & Guaranty Co. vs. Rainey et al, supra, is a suit in the nature of a creditor's bill and was brought against various

creditors of Rainey who might be interested in any fund or funds paid into the hands of Rainey as Clerk of the Circuit Court and for which he was liable on his official bond. The Complainant Company stated that it was ready and willing to pay whatever sum might be necessary under the bonds furnished by it as soon as the proper amount of each bond was determined, and asked for a complete account of the office and exact amount due from Complainant by reason of its surety. Answers were filed by the state, county, etc., averring that Rainey was indebted to the authorities for a large amount of state and county taxes which he had failed to pay over. The Court determined that taxes of the state were entitled to priority as against the general creditors of Rainey. The Court says:

“It is undeniable that by the common laws of England the sovereign, by virtue of his prerogative rights, was entitled to priority of payment of debts due him over debts due his subject. \* \* \* We are of opinion that the prerogative right of the sovereign to receive payment of fines, forfeitures, taxes and revenues and such demands as were due it in its sovereign capacity was a part of the common law transmitted to this state from North Carolina and that the decree of the Chancellor was correct in adjudging priority to the state in the collection of its delinquent revenue on this bond.”

The attention of this Court, however, is respectfully directed to the fact that the assets of the debt-

or *were in his hands* at the time the state asserted its right to priority of payment; that the said assets had not passed to a receiver, neither were they assigned to a trustee for the benefit of creditors. The Tennessee case, therefore, determines only the right of the sovereign at common law to preference in the payment of debts and involves no adjudication of the exception to this sovereign right which also existed at common law. In other words, the title to the debtor's property had not been divested at the time the state asserted its right.

In the case of the Carnegie Trust Co., *supra*, which in the lower court is reported in 136 N. Y. Sup. 466, the Trust Company became insolvent and passed into the hands of the Superintendent of Banks of the State of New York. In the lower court it was found that the Treasurer of the State of New York was not entitled to priority over the claims of the general creditors of the company for certain funds deposited with the trust company, but that his claim should be allowed as a general claim against the company. Upon appeal this was reversed. The decision upon appeal is based upon the rule that at common law the king was entitled to preference in the payment of debts due him from an insolvent before that of a subject. Counsel for appellant contend, however, that the decision in the Carnegie Trust Co. case is clearly distinguishable from the one at bar. It was unnecessary for the Court to determine what exception to the rule of

priority existed at common law for the reason that the facts in the case do not bring it within any recognized exception to the rule. The Superintendent of Banks of the State of New York was in possession of the insolvent bank, but the title to the trust company's property had not passed to the Superintendent of Banks. For this reason, under the general rule of priority at common law, the state was entitled to preference of payment.

In the following cases the right of the state to priority of payment of its debts is recognized but in each instance this right is based upon a positive statute conferring the right:

State vs. Bell, 64 Minn. 400—67 N. W. Rep. 212;

State vs. Northern Trust Company, 70 Minn. 393—73 N. W. Rep. 151;

Insurance Commissioner vs. Commercial Mutual Insurance Co., 20 R. I. 7—36 Atl. 930.

Counsel for appellant contend that under the numerous authorities cited above, there is neither in England nor in this country any recognized qualification or denial of the existence of the rule of law under which the right of the sovereign to preference in the payment of his debts dies the moment the debtor's title is divested unless an assertion of the right by the state has theretofore been made.

A different rule appears to have been announced in Georgia.

Seay vs. Bank of Rome et al, 66 Ga. 609.

In the Georgia case, *supra*, the defendant bank became insolvent and was placed in the hands of a receiver. The bank had certain state funds on deposit secured by surety bond as required by the state depository law. This law gave the state a lien from the date of the execution of the bond upon the property of the bank to the extent of the amount of the bond. After decreeing the state to be entitled to preference of payment to the extent of the lien, the Court said:

“The next and last question we shall consider is as to the right of the state to priority of payment out of the estate of the insolvent aside from the bond, for the excess of the claim of the state above the amount of the bond.”

The right of priority as to this excess was then upheld by the Court. This conclusion is based upon *Robinson et al vs. Bank of Darien*, 18 Ga. 65 and *State vs. Dickson*, 38 Ga. 171. In each of these cases cited by the Georgia Supreme Court in *Seay vs. Bank of Rome* as authority for the rule announced, the broad rule of priority of state demands at common law is decreed to be the rule of decision in Georgia without any recognition of an exception to the rule. While the decision in *Seay vs. Bank of Rome* establishes the rule in Georgia that the state is entitled to preference of payment even where the debtor's title has been divested, it is submitted that the case is not carefully considered, that the rule is in conflict with that established in

England and in all other jurisdictions in the United States where the Courts have had occasion to decide the question, and that the rule established by the Georgia Court should not upon all other precedent and authority form the rule of decision in this case.

**A: The Title of the First Trust and Savings Bank of Billings, Montana, To All Its Property and Assets Was Divested Prior to the Exercise of Any Sovereign Right by the State of Montana or by the Appellee Here, to Preference of Payment.**

The District Court in its decision (Record, page 25) recognizes that the right of the sovereign to preference in the payment of its debts cannot be asserted after the debtor's title to the property out of which it is sought to make the public debt, has been divested; but the District Court has determined that the title to the property here involved in the hands of the receiver appointed on the state's petition has not been divested. This, counsel for appellant contend, is not the law.

The proceedings initiated by the State of Montana, wherein a receiver was appointed for the First Trust and Savings Bank of Billings, Montana, were taken under the provisions of Chapter 141, Laws of Montana, 1909. This Chapter amends Section 4004, Revised Codes of Montana, 1907, but makes no substantial change in said Section 4004 other than to extend the powers of the State Examiner. Both Section 4004 and Chapter 141 provide for the appointment of a receiver of an insolvent bank upon petition of the attorney general in the name of the

state filed in the proper District Court of the state. Section 4004 expressly provides that the receiver so appointed shall wind up the affairs of the corporation, and while Chapter 141 does not in terms specify the receiver's duties in this respect, counsel for appellant contend that the law has not been changed and that the manifest and clear intent of said Chapter 141 is that the affairs of an insolvent banking corporation, upon the appointment of the receiver provided for therein, shall be wound up. If the condition of insolvency should be made good after the notification to the bank's stockholders provided for by said Chapter 141, or after the State Bank Examiner takes possession of the books, records and assets of the bank, it might be contended that the corporation could resume, but if the condition of insolvency is not remedied, and this condition has not been made good in the case at bar, the manifest purpose of the statute then is that as a last resort a receiver shall be appointed and such appointment can manifestly be for the sole and only purpose of terminating the life of the corporation, paying its creditors and winding up its affairs. That the First Trust and Savings Bank of Billings, Montana, is hopelessly insolvent and cannot pay all of its just claims in excess of approximately 60 per cent is alleged by Complainant in its Bill (Record, page 5) and admitted by the Defendant in his Answer (Record, page 16). That under such condition it is unlawful for the banking corporation to

accept or receive deposits of money or to transact any other business as a banking corporation is manifest from the provisions of Section 4007, Revised Codes of Montana, 1907, and that, therefore, not being permitted to do a banking business, the banking corporation must be dissolved and wound up.

Section 4, Chapter 141, Laws of Montana, 1909, providing for the appointment of a receiver of an insolvent bank, does not define the duties and powers of the receiver other than to require the receiver to make certain annual reports to the State Bank Examiner. The conclusion of the District Court in its decision of this case (Record, page 25) is that while the receiver is statutory to the extent that he is appointed by virtue of statutory authority under circumstances not of themselves warranting the appointment by a Court of Chancery, yet he has no greater or other rights and powers than those of a chancery receiver, for the statute creates none, and that such a receiver does not take title to the property involved.

The conclusion of the District Court is supported by no citation of authority. It fails to take into consideration Chapter VI, Part II, Title VII, Revised Codes of Montana, 1907, relating to receivers, and does actual violence to the provisions of Section 6703, relating to the powers of receivers, and included within said Chapter VI, supra. The failure of Chapter 141, Laws of Montana, 1909, to designate the rights and powers of the receiver provided

for therein does not leave the receiver without rights or powers nor limit his rights and powers to such as were possessed formerly by a receiver under an appointment by a Court of Chancery. The District Court, in its decision, says that the receiver in the case at bar "has no greater or other rights and powers than those of a chancery receiver for the statute creates none." This is not the law.

Section 6698, Revised Codes of Montana, 1907, included within the general chapter relating to receivers, provides for the appointment by the Court in which an action is pending or by the Judge thereof of a receiver in a number of cases, including cases when a corporation has been dissolved or is insolvent. It has been decided that said Section 6698 specifies all the cases whether at law or in equity in which receivers can be appointed.

Bateman vs. Superior Court, 54 Cal. 285;  
State Ex. Rel. New York Sheep Co. vs.  
Eighth Judicial District Court, 14 Mont.  
598.

It, therefore, necessarily follows that Chapter 141, Laws of Montana, 1909, in so far as it provides for the appointment of a receiver of an insolvent banking corporation, must be read in connection with Section 6698, supra. There is nothing inconsistent in these separate provisions of the Montana statutes, and it might well be contended that had Chapter 141, Laws of Montana, 1909, wholly failed to provide for the appointment of a receiver upon

application of the state, the State of Montana could, nevertheless, as a creditor of the bank, acting under the provisions of Section 6698, Revised Codes of Montana, 1907, and upon allegations of such a condition of insolvency as is admitted by the pleadings to exist in the case at bar, have secured the appointment of a receiver for the Bank. Such being the case, it is manifest that the provisions of Sections 6698 to 6704, both inclusive, comprehended within Chapter VI, Part II, Title VII, supra, relating to receivers, regulate and determine the rights and powers of the receiver appointed in the case at bar; and Section 6703 distinctly specifies the powers of receivers and reads as follows:

“Section 6703. Powers of Receivers.—The Receiver has, under the control of the Court, power to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the Court may authorize.”

Whether, therefore, Chapter 141, Laws of Montana, 1909, contemplates the winding up of the affairs of an insolvent banking corporation or not, it is, nevertheless, clear that the powers of the receiver, provided for by said Chapter 141, are expressly defined by Section 6703, supra.

Said Section 6703 appears verbatim as Section 5406, Revised Codes of North Dakota of 1899, and

has received judicial construction by the Supreme Court of North Dakota in the case of Brynjolfson vs. Osthus et al (Decided in 1903), 96 N. W. Rep. 261. In that case, which involves a receivership of an insolvent corporation, the Court said:

“It should require no argument to show that the delivery of the deed to her by E. A. Mears subsequent to the appointment of a receiver was of no effect. The Bank of Minot, the grantor, was then in the hands of a receiver, and its officers were stripped of authority to make a delivery, and not only would the appointment of a receiver deprive the officers of the bank of the power to do any further acts which would affect the corporation or its property, but it had the further effect of transferring the title and right of possession of all the property of the bank to the receiver. The appointment of a receiver of an insolvent corporation operates as a suspension of its corporate functions, and of all authority over its property and effects. High on Receiver (3d Ed.) Section 290; Linville vs. Hadden (Md.) 41 Atl. 1097, 43 L. R. A. 222. Further, the title and right of possession of all property of the insolvent corporation, both real and personal, passed to the receiver, as the officer of the Court appointing him, for the use and benefit of the creditors of the insolvent. Section 5406, Revised Codes; Attorney General vs. Insurance Company, 100 N. Y. 279, 3 N. E. 193; Morgan vs. R. Co., 10 Paige 290, 40 Am. Dec. 244; Attorney General vs.

Insurance Co., 28 Hun. 360, affirmed in 93 N. Y. 630; Receivers of Corporations (Gluck & Becker) Chapter 1, Section 5; Osgood vs. Maguire, 61 N. Y. 524; High on Receivers, Section 136. It follows from what we have said that the note and mortgage, which the evidence shows were owned by the Bank of Minot, were not transferred to Eliza V. Hoffman by the Mears' deed, but that they did in fact pass by operation of law to the receiver, Lewis, and that Plaintiff became and now is, the owner thereof, under his purchase from Guptill, Lewis' successor in the receivership."

Said Section 6703 has received judicial construction by the Supreme Court of Montana in the case of B. & M., Consolidated Copper & Silver Mining Co. vs. Montana Ore Purchasing Co. et al, 24 Mont. 142, and upon a further appeal of this case the Court, in its opinion, said:

"The first appeal was from an order vacating a temporary restraining order. It was held upon that appeal that the District Court did not err in dissolving the Order, it being made to appear that a receiver for the Plaintiff had theretofore been appointed in another cause, who had qualified; and it followed from such showing that the Plaintiff had no capacity to sue, but that the right of action, if any existed, was, by the fact of appointment and qualification of the receiver, vested in him under Section 955 of Code of Civil Procedure." (27 Mont. 431).

Section 955 of the Code of Civil Procedure referred to by the Court refers to the Revised Codes of 1895, and said Section is reproduced in the Revised Codes of Montana, 1907, as Section 6703, *supra*.

In *Attorney General vs. Atlantic Mutual Insurance Co.*, (N. Y.) 3 N. E. 193, the Court said:

“The receiver, upon his appointment, became vested with the title to all the property of the company, including its real estate. Section 7 of the Act of 1869 authorized the Court to appoint ‘a receiver of all the assets and credits’ of the company, and provided that the receiver, upon filing his bond, should ‘take possession of all the assets and credits’ of the company. The word ‘assets’ where it is used in the several sections of that Act, manifestly means all the property, real and personal, of any company coming under its provisions. No provision is made in the Act for any formal conveyance to the receiver, and it cannot be supposed to have been the intention of the Legislature to leave the title to its real estate in the insolvent company subject to the risks of judgment liens or other complications. The purposes of the Act require that such title should at once vest in the receiver, and we think the Act should receive such a construction as to effectuate such purpose. It is not a general rule that a receiver can only take title from an insolvent person or corporation by formal conveyance.”

The following authorities further establish the

rule announced in the above cited cases:

Ryan vs. Kingsberry (Ga.) 14 S. E. 606;  
Cobb et al vs. Camden Savings Bank (Me.)  
76 Atl. 670;  
American Nat. Bank of Denver vs. Nat.  
Benefit & Casualty Co. et al, 70 Fed. 420;  
Strout vs. United Shoe Machinery Co., 195  
Fed. 313 and 321.

The foregoing authorities definitely and conclusively establish that upon the appointment of the receiver for the First Trust & Savings Bank of Billings, Montana, the title to all of its property, both real and personal, became vested in the receiver; and by virtue of this fact, the title of the state's debtor having been divested prior to the institution of any proceedings by the State of Montana or by the appellee here by virtue of any subrogation, it necessarily follows that any right to preference of payment either of the state or of the appellee has been lost.

**B: By the Appointment of the Receiver the Bank Lost Control Over the Property and the Same Was Placed Beyond the Reach of Any Creditor.**

We submit that it is wholly immaterial whether the title to the property of the bank passed to the receiver. In any event the property, after the appointment of the receiver, could not be disposed of by the bank or reached by any process to enforce the claim of a creditor, and was just as effectually beyond the control of the bank and protected against

seizure by the state as a creditor as though the same had been sold by the bank and possession delivered.

Gardner v. Caldwell, 16 Mont. 221;

Ex Parte Tyler, 149 U. S. 164.

The exception to the common law prerogative of the king of a preferential right of payment was based on the fact that the property had passed beyond the right of disposition and right of control by the debtor. This ordinarily occurred by the debtor parting with his title, but it was not necessary to the exception that title should be divested, provided the debtor lost control, possession, and the right of disposition of the property.

In the following cases it was decided that the appointment of a receiver precluded the state from asserting a right of priority of payment.

Board vs. Bank, 29 N. J. Eq., 268;

State vs. Williams, 101 Md. 529;

Zimmerman vs. Bank, 125 N. W. 424.

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**4. If the Prerogative of the Crown to Preference of Payment Is Now a Prerogative Right of the State of Montana as a Sovereign Power, The Appellee Here Is Not Subrogated to Such Right Since the State of Montana Has Failed to Exercise Its Prerogative Right in the case at Bar.**

In the case of Zimmerman, Commissioner of Banking, vs. Chelsea Savings Bank et al, 127 N. W. Rep. 351, the Court says:

“We said in the foregoing opinion, concerning the question of the prerogative right of the state as creditor to be preferred to other creditors of the debtor: ‘The question is not presented for decision in this case, unless, assuming the right to exist, the intervening surety may insist upon the exercise of the right by the state.’ We proceeded then to apply the rule that at the common law the right of the sovereign to priority over other creditors of a debtor was one which must be asserted before the assets of the debtor had passed beyond his control. On the application for rehearing it was urged that the opinion did not meet the contention that the intervening petitioner is, as to the state, a surety of the debtor, and that the state itself, by its officers, instituted the action which divested the debtor of its property. The opinion does not answer precisely this contention, for which reason and because one of the justices who took part in the decision had left the bench before the motion for rehearing was presented, it was ordered that the cause be reheard.

“In the former opinion some reference is made to authorities. Further references are: (citing cases). The cases arose upon the assertion in some form of the alleged right of the state. The opinions relied upon by appellant are judicial assertions that in the particular jurisdiction this prerogative right of sovereignty, as recognized by the common law, has been asserted by the very act of adopting the

common law into the jurisprudence of the state, and therefore may be enforced by the Courts. This is the form of the contention made by appellant, and it is this alleged right of the state which it is claimed should have been exercised in the particular case, and that the surety stands, before the law, in the position it would have occupied had the state exercised the right. A royal prerogative is an arbitrary power vested in the executive, a power or will which is discretionary and uncontrolled (2 Bouvier ((Ralle's Rev.)) 730) and in some, if not all, of the decisions which have been examined the term 'prerogative' is evidently employed in the sense that it is an arbitrary power of the state, as distinguished from a sovereign power, which becomes effective in exercise thru legislation. It is clear that no one may complain because the sovereign has not exercised a discretionary and arbitrary right. The argument made for appellant is thus completely answered."

In this case the intervenor, after paying to the State of Michigan its obligation as surety under a bond given to protect the State in deposits made in the defendant bank, intervened in the proceeding to liquidate the assets of the bank, claiming a right of preference of payment by virtue of a subrogation to the state's rights. The prayer of the intervenor was denied for the reasons given in the opinion above quoted.

In the case at bar the State of Montana has not

asserted a prerogative right to preference of payment but has, as appears from Exhibit A attached to Complainant's bill (Record, page 8), made proof as a general creditor only and accepted from the receiver a certificate in the usual form of such indebtedness. Under these facts, and applying the rule in *Zimmerman vs. Chelsea Savings Bank*, supra, we contend that the appellee here is not entitled to preference of payment out of the assets of said Bank. The Court in the above cited case has clearly announced the rule to be that there is no subrogation by a surety to a prerogative right of the state to preference of payment where the state has failed, as in the case at bar, to exercise the prerogative.

The rule announced in the foregoing case of *Zimmerman vs. Chelsea Savings Bank* is not in conflict with the doctrine expressed by the Supreme Court of the United States in *Hunter vs. United States*, 5 Pet. 173. In the latter case the Court says:

“The same right of priority which belongs to the government attaches to the claim of an individual who as surety has paid money to the government.”

The decision in this case is based entirely upon a statute creating the right of preference. There is no consideration by the Court of a prerogative right as distinguished from a statutory right and for this reason the case is clearly distinguishable from the

case of Zimmerman vs. Chelsea Savings Bank, supra. The case of Hunter vs. United States is a leading case upon the doctrine there announced, but so far as our examination has extended, we have found no cases in any jurisdiction where the doctrine of Hunter vs. U. S. has been applied that are not in like manner decided with reference to a statutory right as distinguished from a prerogative right.

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**5. The Right of the Appellee Here Under  
the Assigned Claim of the State of Montana  
Is Only That of a General Creditor.**

In the case at bar the State of Montana has made proof that it is a general creditor of the First Trust and Savings Bank of Billings, Montana, (Record, page 8) and has received from the receiver of said bank a receiver's certificate. This certificate has been assigned by the State of Montana to the appellee.

If appellee is not entitled to a preference by virtue of the doctrine of subrogation there can be no right of preference by reason of the assignment of the receiver's certificate. In other words, the right by assignment cannot be greater than the right by subrogation. Assuming that the state had a right of preference which it might have exercised, as it failed to do so and the title had passed from

the debtor and the right to claim a preference was gone at the time of the assignment, there could be no right of preference conferred upon appellee by the assignment. Of course, if there is no preferential right to payment by the state, as we maintain, the assignment did not confer such right on appellee irrespective of the fact that the assignment was not made until after the receiver was appointed.

\* \* \* \*

For the reasons given in the foregoing Brief of Argument, counsel for appellant submit that the appellee is not entitled, with respect to the assets of the First Trust & Savings Bank of Billings, Montana, in the hands of its receiver, to rank as a creditor preferred to all other creditors, but that the appellee is merely a general creditor entitled to dividends as they are declared, distributed and paid to the general creditors of the bank, and then only in the same ratable proportion as all of the general creditors are paid. Counsel further submit that the decree of the United States District Court for the District of Montana is, therefore, erroneous and should be reversed.

\* \* \* \*

The complaint alleges: "The complainant herein was authorized to begin and prosecute an action against the said receiver for the relief herein prayed." (Record, p. 6).

This authority does not authorize an action in

the federal court of Montana.

Porter vs. Sabin, 149 U. S. 473.

Respectfully submitted,

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CAMPBELL & WOOD,

GUNN, RASCH & HALL,

Attorneys for Appellant.



6.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

ARTHUR H. BROWN, as Receiver of the First Trust  
and Savings Bank of Billings, Montana,

Appellant,  
vs.

AMERICAN BONDING COMPANY OF BALTI-  
MORE, MARYLAND, a Corporation,

Appellee.

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BRIEF OF APPELLEE.

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WALSH, NOLAN & SCALLON,  
Solicitors for Appellee.

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This cause presents no disputed question of facts. All the material allegations of the bill are expressly admitted by the answer. It was heard upon the bill and answer and the sole question was that of whether the State of Montana and the complainant, its assignee, subrogated to its rights, may claim a preference in the distribution of the assets of the insolvent First Trust and Savings Bank of Billings.

I.

The claim of the complainant rests upon the general proposition that at the common law debts due the Crown were payable in preference to those due the subject, and that a levy upon the property of the common debtor to satisfy the claims of the subject gave place to a later levy at the suit of the sovereign.

"It is undeniable that by the common law of England the sovereign, by virtue of his prerogative rights, was entitled to priority of payment of debts due him over debts due his subjects. 8 Bacon's Abridgment, tit. 'Prerogative,' p. 91; 1 Kent's Commentaries (14th Ed.) \*257; Blackstone's Commentaries, book 1, p. 240, foot page 210; id. book 2, star pages 409, 511, foot page 833 (4th Ed.); Giles v. Grover, 9 Bing. 128."

U. S. Fidelity & Guaranty Co. v. Rainey et al., 120 Tenn. 157, 113 S. W. 397 at 408.

The rule had its foundation in public policy that the state might not be embarrassed for the necessary funds with which to carry out the purposes of its existence. In our country the prerogatives of the Crown, so far as they are consistent with republican institutions, have vested in the various state governments, and it has, accordingly, been held in many states that the claims thereof are entitled to the same priority as those of the Crown of England in the distribution of insolvent estates, estates of decedents, etc.

Section 3552 of the Revised Codes of Montana, 1907, provides as follows:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, or of the codes, is the rule of decision in all the courts of this state."

This section expresses the law of this state since the beginning of its political existence. The idea was thus expressed in the "Bannack" statutes, passed in January, 1865:

"Sec. 1 That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority."

Statutes of 1864-5, p. 356.

Although it is held in some states that the rule above stated forms no part of the common law of this country, the general compilations tell us that the weight of authority is to the effect that it is and that the state enjoys the same preference as did the King of England.

36 Cyc. 871.

26 Am. & Eng. Ency. of Law, 479.

8 Id. 1047.

It is asserted by the courts of the following states, viz.: Maryland:

State of Maryland v. Bank, 6 Gil. & J. 205, 26 Am. Dec.. 561.

State v. Mayor, 10 Md. 504 (referred to in note to 26 Am. Dec. 561).

New York:

In re Carnegie Trust Co., 136 N. Y. Supp. 466, same case on appeal 206 N. Y. 390; 99 N. E. 1096.

North Carolina:

Hoke v. Henderson, 14 N. C. 12.

Tennessee:

U. S. Fidelity & Guaranty Co. vs. Rainey, et al., 120 Tenn. 157, 113 S. W. 397.

Georgia:

Seay v. Bank of Rome, 66 Ga. 609.  
Booth v. State, 131 Ga. 750, 63 S. E. 502.

Wyoming:

State v. Foster, 5 Wyo. 199, 29 L. R. A. 226.

The priority was, likewise, recognized in Pennsylvania until the rule was modified by statute.

See Commonwealth v. Lewis, 6 Binn. 266, and cases collected in note to State v. Foster, 29 L. R. A. on pages 243-244.

It is denied in New Jersey, South Carolina, Mississippi and Michigan.

Clearly this right of priority is not, in the language of our code "repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state or of the codes," nor can it be said of it, in the language of the Bannack statutes, that it is not "applicable and of a general nature," or that it is "in conflict with special enactment" of our legislature.

In *Dollar Savings Bank vs. U. S.* 86 U. S., 19 Wall, 227, cited in the opinion in the court below, it is said:

"It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity as *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution."

II.

THE STATE'S RIGHT TO PRIORITY HAS NOT  
BEEN ABROGATED.

The contention of appellant that the provisions of the Montana Codes cited by it, viz. Sections 6214, 6123-6125 and 6140 have abrogated the right of priority, cannot be sustained. Section 6214 does not abrogate the common law as a whole. Indeed, where the Code contains no provision on any given subject, the common law is expressly kept in force by the Codes. Section 3552, quoted both in appellant's brief and in this brief, expressly so declared. Section 6214 is a rule of interpretation. Its purpose was to prevent a strict construction of the Code, under the rule that statutes in derogation of the common law are to be strictly construed. Section 8060 also quoted in appellant's brief, positively provides that where the law is not declared in the Code or in a statute, the common law shall be the law, and the rule of decision, if it be applicable and of a general nature and not in conflict with the code or other statutes. (Appellant's Brief page 5.)

This is, in effect, a repetition of section 3552, with, possibly, some added emphasis.

It must follow that unless the common law right of priority of the state is in conflict with some provision of the code, it has not been abrogated. The only one of the sections cited by appellant upon which any argument can be based in favor of the alleged abrogation is section 6140. It is quite evident that this section was never intended to abrogate any liens, or any rights of priority of payment over general creditors.

It was intended to create additional liens or rights of priority and, perhaps, to prefer them over other preferred claims but not to abrogate any. That section establishes rights of priority in favor of miners, mechanics and other employes for wages and salaries for limited periods. To say that such a section excludes all other liens would be to say that the state's right of priority for taxes levied would be destroyed by it, and such a proposition would not be entertained. It may possibly have the effect of preferring the claims mentioned in that section over other debts. It, doubtless, would require such claims to be paid in preference to general creditors, and also prior to any preferences created by the assignment itself, but it does not follow from that that as against general creditors, the priority of the state would not still obtain.

The case cited by appellant, viz,

**Guaranty Title & T. Co. v. Title Guaranty & S. Co.**  
**224 U. S. 152,**

does not support its contention, and is, really, an argument in favor of the decision of the court below in this case. The case cited involved merely a question of priority and of preference between the United States as a creditor, and labor claims, under the provisions of the Bankruptcy Act of 1898. It was held that under the Act of 1898, labor claims are to be paid next after taxes and in preference to all other debts. No such question arises here. There is no conflict here between the claims of the state or its subrogee and any labor claim. It does not appear from the pleadings that there are any other preferred claims or liens or claims having priority. On the contrary, it appears from the answer, by implication at least,

but by necessary implication, that there are no privileged or preferred claims. The answer avers that a dividend of twenty per cent has been paid, but that it is doubtful whether the receiver will be able to pay sixty per cent on the claim of the complainant, such dividends involve, of course, ratable distributions. Nothing is said in the answer about any labor or preferred claims. It must, therefore, be taken that there are none in existence. So, we have here a case of the state on one side and general unpreferred creditors on the other. The decision of the Supreme Court is really an authority in our favor. It upholds the proposition already decided by previous cases: "That the United States, as a sovereign, is not bound by the general language of a statute, and is not bound by the provisions of an insolvency law, unless specifically mentioned therein." This rule is, of course, applicable to the state with equal force, in so far as state laws are concerned. There is nothing in the statute which indicates any intention to affect the rights of the state or to abrogate its common law rights. Under the rule just stated, as well as under the other rule of interpretation that repeal by implication are not favored, it must, therefore, be held that the state is not bound by the general language of a statute or by a state insolvency law, unless specifically mentioned therein. The case above referred to is also instructive in another respect. In the very sentences quoted by appellant, the court calls attention to the nature of the provisions of the Bankruptcy Act of 1898. It notes especially that that Act takes into consideration "the whole range of indebtedness of the bankrupt—national, common, state and individual—and assigns the order of payment." It

cannot be said that section 6140 takes into consideration "the whole range of indebtedness" of the insolvent and assigns the order of payment. All that that section does is to take into consideration one class of claims, namely, labor claims, and it prefers them over the claims of other creditors. Especially when read in connection with Section 6142, it seems clear that the only purpose and effect of section 6140 is to provide for labor claims which otherwise would be left without protection.

The rule *expressio unius, exclusio alterius* cannot be invoked for the very simple reason that the section does not purport to declare what priorities or liens shall be allowed, but merely to establish a right of priority, in favor of persons who otherwise would not be entitled to any.

This matter, however, is not left open to argument. The code itself concludes it. Section 6142 provides:

"CERTAIN RIGHTS NOT AFFECTED BY PREFERENCES IN ASSIGNMENT.—No provision in an assignment, giving a preference to a creditor, can affect or impair any right of another creditor to priority of payment, *whether created by law, or arising from an obligation or transaction of the parties.*" (Italics ours).

By this section, all rights of priority, including those "created by law" are preserved. In view of this express provision it certainly cannot be said that an assignor can, by his assignment, destroy rights of priority.

### III.

THE APPOINTMENT OF A RECEIVER TO THE TRUST COMPANY DID NOT AFFECT THE RIGHT OF PRIORITY; NO MATTER WHAT

## THE CHARACTER OF THE RECEIVER'S RIGHT OR ALLEGED TITLE MAY BE HELD TO BE.

The appointment of the receiver to the trust company was made, as stated in appellant's brief, in pursuance of section 4004 of the Revised Codes of 1907, as amended in 1909. (Statutes of 1909, page 218.) This section as amended reads as follows:

**"I. Section 4004. IMPAIRMENT OF CAPITAL. DUTIES OF STATE EXAMINER.** Whenever the State Examiner, after a full and careful examination of the affairs of any banking corporation, trust deposit and security company or savings bank, organized under the laws of Montana, or any foreign corporation or branch thereof doing a banking business in Montana, shall find evidence of impairment or insolvency, he shall immediately prepare and submit a statement of its condition to the Governor and Attorney General, and if the Governor and Attorney General are satisfied from such statement that such impairment or insolvency exists, they shall order the State Bank Examiner either (1) to notify the bank's stockholders to make good such impairment or insolvency in a specified time, or (2) to immediately take charge of such bank or trust company and to furnish an official bond for such sum as they designate.

2. If so ordered, the State Bank Examiner shall forthwith take possession of the books, records, and assets, and shall be authorized and empowered, and is directed to take such action as, in his judgment, is best for the protection of the depositors and stockholders of such bank.

While in charge of the State Bank Examiner, the books, records and assets shall not be subject to any levies or attachments.

3. If the stockholders do not make good the impairing or insolvency within the time required after notification, the State Bank Examiner is authorized to take charge of such Bank, its property and assets, upon direction of the Governor and Attorney General.

4. It appearing necessary to have a Receiver appointed for any such Bank or Banks, the State Examiner shall make full and complete statement of account and report to the Governor with respect to the condition of its business and affairs; and thereafter, should it appear to the Governor that application should be made for the appointment of a Receiver, he shall thereupon direct the Attorney General to file a petition in the District Court of the County in which the Bank is situated, asking for the appointment of a receiver, in the name of the State of Montana, and such petition shall be controlling, and by the Court so considered and acted upon, even though stockholders, creditors, or others, may have theretofore filed applications for the appointment of a Receiver. When any such petition is filed by the State, no suggestion shall be contained therein as to any particular person to be appointed in such capacity. Receivers of all insolvent Banks shall make reports to the State Bank Examiner in the same manner as is required of other Banks, at least three times each year, when called upon to do so, or at any time when requested by the State Bank Examiner. Any Receiver who refuses to submit the affairs of such Bank to an examination by the State Bank Examiner or his Assistants, or fails to make report when called for by said officer, or who violates any of the provisions of law relating to examination of banks, shall be subject to removal.

5. The Receiver provided for in this Section shall receive such compensation as shall be allowed by the Court, but in no event to exceed the fees allowed executors and administrators in administration of estates.

6. The expense for traveling, hotel bills and time actually spent, incurred by the State Bank Examiner's office in performance of the duties imposed by this Section, shall be paid in full by the Bank to the State Treasurer and by him credited to the State Examiner's fund."

We do not admit the correctness of appellant's interpretation of the effect of the amendment of 1909. The omissions from the original section, as well as the additions to it, must be taken to be the result of a deliberate purpose and intention on the part of the Legislature. But, for the purpose of the dis-

cussion of the point with which we are now dealing, it may be assumed that the appointment of a receiver was for the purpose of winding up, if winding up was found necessary, and that by virtue of the appointment, the receiver became vested with such title, as was necessary for the performance of his trust.

We submit that it doesn't follow that the right of priority of the state was destroyed by his appointment, and that there is no good reason why the appointment should be held to have had that effect.

Two of the cases cited by appellant in support of its theory of abrogation, viz., the New Jersey case of *Board of Middlesex v. Bank*, 29 N. J. Eq. 268, and *State v. Williams*, 101 Md., 529, were cases where receivers had been appointed. In the Michigan case, the state banking department had taken control of a bank. The Wyoming case and the North Carolina case relate to different situations, as will be shown. The Michigan, New Jersey and Maryland cases seem to have been decided upon an assumed analogy between an assignment for the benefit of creditors and the appointment of a receiver, or possession taken by the state banking authorities. In the New Jersey case, the right of priority had been denied, and what is said regarding the question now under consideration seems to have been unnecessary to the decision.

We submit that there is no real analogy; and, further, that the decisions in which it is said that assignments for benefit of creditors will defeat the right of priority must be read and understood in the light of the facts to which they related, and when thus read, will be found to be more limited in their appli-

cation than is assumed by appellant. With regard to such cases, we respectfully submit: That a study of them will lead to the conclusion that a conveyance by a debtor or an assignment by him for the benefit of creditors operates to defeat the priority of the state or sovereign, where the conveyance or assignment created a right of title hostile to or exclusive of the claim of the sovereign. A sale of the property, necessarily, has that effect, for, in a sale the title acquired by the purchaser is intended to be exclusive. An assignment for benefit of creditors generally, the effect of which is to give to the creditors the right to be paid equally and ratably also creates rights hostile to and exclusive of the priority or any preferences. An assignment with preferences, where preferences are allowed by law, would to the same effect. In the one case, the right of all creditors to be paid ratably; in the other case, the creditors to whom lawful preferences were given, would, of course, acquire rights hostile to, and, if valid, exclusive of a claim of priority not expressly protected by law. It is evident these were the kinds of assignments which the courts had in mind when they held or stated that an assignment for benefit of creditors operated to defeat the right of a priority of the sovereign or of the state. But it is easy to suppose a case of an assignment for the benefit of the creditors which would not create any rights hostile to the right of priority, and which, on the contrary, would recognize such right. Let us suppose, for instance, that an assignment to a trustee by an insolvent should expressly provide that the creditors should be paid in the order of priority recognized by law. There would be no sound reason for holding that such an assignment

destroyed the right of priority. The debtor would have parted with his title, it is true, but there would be nothing in the assignment or in the nature of the title acquired by the assignee or in the rights of the general creditors under the assignment that would be antagonistic to the priority. We are quite ready to concede the correctness of the decisions which have dealt with assignments the effect of which was to create rights hostile to the claim of priority, and which, in effect would, necessarily, exclude it. But we submit that it doesn't follow that the courts that have passed upon the effect of such assignments would have denied the right of the sovereign, if the assignment had left the distribution of the assets to be made according to law and according to the priority recognized by law. On the contrary, reason and logic would have required different rulings, to-wit, rulings upholding the priority.

Regarding this point, we submit that there is a controlling consideration in Montana, and by reason of which the decisions relating to the effect of an assignment for benefit of creditors, even if broader than we have just now contended, cannot be held to apply. We have already quoted Section 6142 of the Revised Codes of Montana. By virtue of that section, an assignment for the benefit of creditors is not allowed to destroy or affect any priorities created by law. The effect of that provision must be held to be, to save and preserve the state's priority in spite of the act of the debtor in making the assignment. Any assignment made in Montana is made subject to that provision. It must be interpreted in exactly the same manner as if that provision had been contained in the instrument of assignment. In other words, under any assignment in

Montana, all rights of priority created by law are protected. They must, necessarily, include the state's right of priority. We, therefore, submit that even if the argument from analogy had substantial force, it would have no application here, but, on the contrary, any argument from analogy would, necessarily, lead to a different conclusion from that contended for by appellant.

“Where the reason of a rule ceases so should the rule itself.” Montana Revised Codes, Sec. 6178.

If, therefore, an assignment under the Montana statute cannot defeat the state's right of priority, then, surely the appointment of a receiver should not have that effect. It would, indeed, be a curious result, if the appointment of a receiver made at the instance of the state, in a proceeding brought by the state, in the exercise of its right of supervision over banking corporations, should defeat its own rights. It cannot have been the intention of the statute that such result should follow, else, it would have made an express provision to that effect.

We submit, further, that there is no real analogy between an assignment for benefit of creditors creating rights hostile to the right of preference and the appointment of a receiver.

For what purpose, let us ask, is a receiver appointed in a case like the one in question here? The answer readily suggests itself: For the purpose of the protection of all parties according to their respective interests; for the realization of the assets and the distribution of the proceeds according to law.

If the statute providing for the receivership contained directions regarding the distribution of the property, the statute

would, of course, control, but where there are no statutory provisions, the matter must be deemed to be left to the general rules of law and equity applicable to such cases. In this respect, there is a clear distinction between the effect of such an appointment, and an assignment for benefit of creditors, which either gives special preferences or directs the distribution of property ratably between all creditors. The appointment of a receiver is not in itself hostile to any right of any creditor or to any lien or right of preference. An assignment of the nature supposed, necessarily, is hostile.

It is true that by the appointment of a receiver, the control over the property is taken out of the hands of the debtor, and that creditors thereafter cannot proceed against the property directly, but must apply to the court for relief; but, as we shall show further on, this merely relates to the method of procedure, and the substantial rights of the parties should not be held to be affected thereby. In this case, the officers of the state, as directed by the statute, took steps, the purpose of which was, as pointed out by the court below, the protection of all interested parties, but there is nothing in the statute or in the nature of the proceedings which is hostile to, or exclusive of, the right of priority, and the discharge of the statutory duty imposed upon the officers of the state, as well as of the discharge of his duties by the receiver, is not inconsistent with the rights of the state.

The case of *Booth vs. State*, 131 Ga. 750, already cited in this brief, is very similar to the case at bar in its essential features and is very instructive. It appears from that case that the statutory provisions of Georgia relating to the deposit of

state moneys in banks and regarding the liquidation of insolvent banks are very similar to ours. There, as here, a receiver had been appointed at the suit of the state. The Attorney General in behalf of the state had instituted the suit for the appointment of the receiver. This would be the same thing, in effect, as a suit by the state, and the state's rights were upheld. In the New York case, *In Re Carnegie Trust Company*, the bank was in the hands of the state superintendent of banks, who had taken possession and was liquidating under the bank law of the state of New York, by which he was authorized to take possession to collect assets and make distribution. In effect, the condition was similar to those obtaining in the Michigan case. The New York Court of Appeals affirmed the judgment of the appellate division of the Supreme Court, and upheld the right of the state. Appellant attempts to distinguish this case by saying that the superintendent of banks had no title; but if the bank was insolvent and he was the liquidating officer with power to dispose of the property, he surely had as much title as a receiver would have, and as much as similar officers in Michigan. We quote the New York statute as it then existed, in the appendix to this brief.

As pointed out by the court below, the bank in this case had not been dissolved. The statute does not require its dissolution as a condition of the appointment of the receiver. As to whether its dissolution would eventually follow, as a matter of course or necessity, we do not inquire. It is familiar knowledge that in similar cases, banks have been rescued from insolvency either through arrangement with creditors or by stockholders putting up the deficiency. Whatever the right or

title of the receiver may be, it comes to him through the law. It is at best of a qualified nature. All of these considerations go to show that the appointment of the receiver and his title, such as it is, are not adverse or hostile to the rights of creditors.

*As a sub-division of his third proposition, the appellant also contends that by the appointment of the receiver, the bank lost control over the property, and the same was put beyond the reach of any creditor.* Assuming that to be true, it does not follow that the state lost its right thereby. It is quite true, as already admitted, that the property is placed beyond the reach of the creditor, if by that is meant individual or direct action on the part of a creditor against the property itself. It is, of course, familiar law that the creditor cannot attach or levy upon property in the custody or under the control of the court, but it isn't beyond his reach in the sense that his claims or his substantial rights are impaired. Instead of having to sue or attach, the creditor applies to the court, and the court, in the distribution of the assets, protects his rights. In this connection, we quote from the Supreme Court of the United States in *Ex Parte Tyler*, 149 U. S. 164 (a case where a sheriff had attempted to levy on property in the possession of a receiver), the following pertinent passage:

"It may be conceded that the state did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets, a right which it could have enforced through its revenue officers by the summary process of distress, but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the adminis-

The passage is quoted by U.S. Supreme Court from decision by Supreme Court of Missouri in 98 Mo. 458, referred to by U.S. Supreme Court. In connection therewith see also

tration and distribution of those assets to respect that paramount right, upon the untrammeled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets *in custodia legis* except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied, and upon the receiver to see, that the taxes due the state were paid before the estate was distributed to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt, and be cut off unless presented to the court for allowance within a given time."

If the State, from motives of public policy, ought to be accorded a priority for taxes due it which have never been paid, it ought, for the same reason, to have a priority in respect to these funds which, of course, arose in all probability from taxes which had been paid to it, and which had simply been deposited in the bank to await the time when the State should have occasion to devote them to the uses for which they were collected. The mind readily admits the priority of any claim of the State for the payment of taxes due it, but priority as to other claims is not so generally accorded. It must be admitted that no ground for any distinction in this regard can exist, as pointed out in the opinion in the *Carnegie Trust Company* case.

The case of *State v. Foster* (Wyo.) in its reference to assignments simply stated general principles. It was not called upon to decide the effect of assignments for the benefit of creditors or receiverships. The question for decision there was

Constitution of Montana, Article 5, Sec. 39.

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a different one. The North Carolina case of *Hoke v. Henderson* had to do with an actual sale.

#### IV.

### THE STATE HAS NOT FAILED TO EXERCISE ITS RIGHT, AND THE APPELLEE IS ENTITLED TO SUBROGATION.

How can it be said that the state has failed to exercise its right, and under what principles of law can laches be imputed to the State? Who was the officer competent, either to waive the rights of the state, or by his inaction, to impair the state's rights?

It is, of course, familiar law that laches cannot be imputed to the state, and that no official, unless he be given, by the constitution or the statute, some express power so to do, can waive any right of the state, or, by his neglect of duty, impair the state's rights. The quotation just made from the United States Supreme Court in *Ex Parte Tyler* is sufficient answer to this contention.

See also

A. & E. Encyc. of Law Vol. 26, pp. 479-480.

Moreover, under the express provisions of the Montana Codes the appellee is entitled to subrogation.

Revised Codes of 1907:

Section 5691. "THE SURETY ACQUIRES THE RIGHT OF THE CREDITOR.—A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to

contribute thereto, without regard to the order of time in which they became such."

Section 5692. "SURETY ENTITLED TO BENEFIT OF SECURITIES HELD BY CREDITOR.—A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not."

There would seem no reason why the surety, paying the debt to the state should not, under the general rules of subrogation, succeed to all of the rights of the state, in the enforcement of its claim. If the state had taken securities to insure the payment of any debt to it, the surety would be entitled to the benefit of those securities.

It is impossible to admit the application of the doctrine of subrogation in the case of securities taken by the state and deny it in respect to the priority enjoyed by the state in consequence of its sovereignty. The debtor to the state can secure a surety for his obligations thereto, much more readily than can the private individual. The risk to the surety is not so great. The surety will reason with himself that inasmuch as the State has a preference in the distribution of the assets, it is altogether likely that he will not be called upon to pay,—that is to say, that the State will first exhaust the assets of the debtor before calling upon the surety. It is, accordingly, only just that if the State should choose to proceed against the surety first, he should have the same right to be paid in preference out of the assets of the debtor.

The right of subrogation is upheld in:

Orem v. Wrightson, 51 Mr. 34; 34 Am. Rep. 286.

This case has been cited as authority in many cases in various states, as will be seen by the note in Vol. 17 of Notes on American Reports, page 785.

See also

Hart v. Tienan, 59 Conn. 521; 21 Atl. 1007.

American Bonding Co. v. Mechanics' Bank, 97 Md. 598; 55 Atl. 395; 99 Am. St. Rep. 466.

And see note to the above named case, on pages 497 ea seq.

## V.

The receiver's certificate of proof of claim (Tr. p. 8), certifying that the state treasurer had made proof "that he is a general creditor of the First Trust and Savings Bank of Billings, Mont., etc.," does not detract from the complainant's rights. Such a certificate could not, of course, detract from the rights of the state. It was not for the receiver to determine what the claim of the state was, whether it was a preferred claim, or merely a claim of a general creditor. That could only be judicially determined. The certificate was issued to the official "as treasurer of the State of Montana." It was, therefore, a certificate issued for the benefit of the state. Its acceptance by the state treasurer could not amount to a waiver of the rights of the state.

The foregoing is merely the application of familiar principles of law, to the case in hand.

## VI.

Appellant, as its last point, questions the sufficiency of the authorization granted by the state court to the plaintiff to sue the receiver, in so far as it applies to a suit brought in the fed-

eral court. This point is now presented for the first time. We take it that it will not be seriously pressed. The answer admits that said complainant was authorized to bring action against said receiver as alleged in the bill of complaint (Tr. pp. 16-17). No objection was raised by answer or otherwise, to the sufficiency of the order to authorize the bringing of the suit in the federal court. Upon the allegations of the complaint and answer, it must be taken that the order was sufficient to authorize the bringing of an action in any court of competent jurisdiction. The case cited by appellant, viz, Porter v. Saben, 149 U. S. 473, is not at all in point. That case held that a receiver could not be sued without the consent of the court which had appointed him. It appeared in the complaint in that case that application had been made to the state court for leave to sue, and that leave had been refused. The proper objection was raised by demurrer, and the court held the case should be dismissed for lack of authority to bring suit. Evidently, the case has no relevancy to the point sought to be made by appellant. Here the complainant has obtained leave.

Respectfully submitted,  
WALSH, NOLAN & SCALLON,  
Solicitors for Appellee.

## APPENDIX.

(Law of Montana relative to the deposit of state funds in Banks.)

### "183. DESIGNATION OF STATE DEPOSITORYES. REGULATION OF DEPOSITORIES.

—The State Treasurer shall designate as depositories, as many banks within the state as in his judgment are necessary for the safe keeping of the public moneys in his hands as hereinafter directed; provided that all banks by him designated as depositories shall undertake and agree, as a condition precedent to the depositing of any funds with them for safe keeping, that interest shall be paid upon the daily balances of all such deposits at the rate of two and a half per cent per annum, and all deposits shall be adequately and properly secured to the Treasurer as herein specified. No deposits shall be made of state funds by the State Treasurer until he shall first have received as security therefor, in amount at least equivalent to the amount of such deposit, bonds of the United States, or of the State of Montana, or county, school district, or municipal bonds issued in this state, or such other good and sufficient security as shall have been first approved by the State Board of Examiners. All such deposits shall be subject to withdrawal by the said treasurer in such amounts as may be necessary, from time to time, to pay and discharge the legal obligations of the state duly presented to him in accordance with the law. No deposit of said funds shall be made or permitted to remain in any bank unless the treasurer shall have first designated such bank as a depository, nor until the security for the deposit shall first have been deposited with the treasurer and have been approved by the State Board of Examiners. In designating the depositories for state funds, the State Treasurer shall, as near as may be found practicable, make designation of depositories in the respective counties of the state, and cause to be deposited in them public funds proportionate to the amount of public revenue received from such counties by the state. All interest paid and collected on deposits shall be, by the treasurer, credited and belong to the particular fund to which belong the moneys deposited and on which interest is paid. The treasurer shall have the power to direct the withdrawal of all such moneys

from any bank for any reason. Nothing herein contained shall be construed as limiting or impairing the right of the State Board of Land Commissioners to invest public moneys in bonds or other securities as otherwise provided for by law." (Act approved March 7th, 1907, § 1.)

(Laws of New York. Chapter Two of Consolidated Laws as enacted by Chapter Ten of the Laws of 1909.)

**Section 19. "PROCEEDINGS AGAINST AND LIQUIDATION OF DELINQUENT CORPORATIONS AND INDIVIDUAL BANKERS.**

Whenever it shall appear to the superintendent that any corporation or individual banker to which this chapter is applicable has violated its charter or any law of the state, or is conducting its business in an unsafe or unauthorized manner, or if the capital of any such corporation or individual banker is impaired, or if any such corporation or individual banker shall refuse to submit its books, papers and concerns to the inspection of any examiner, \* \* \*, the superintendent may forthwith take possession of the property and business of such corporation or individual banker, and retain such possession until such corporation or individual banker shall resume business, or its affairs be finally liquidated as herein provided. On taking possession of the property and business of any such corporation or individual banker the superintendent shall forthwith give notice of such fact to any and all banks, trust companies, \* \* \*. Upon taking possession of the property and business of such corporation or individual banker the superintendent is authorized to collect moneys due to such corporation or individual banker, and do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. The superintendent shall collect all debts due and claims belonging to it, and upon the order of the supreme court may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such corporation or individual banker on such terms as the court shall direct; and may, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders. \* \* \*. The superintendent shall cause notice to be given

by advertisement, in such newspapers as he may direct, weekly for three consecutive months, calling on all persons who may have claims against such corporation or individual banker to present the same to the superintendent, and make legal proof thereof at a place and within a time, not earlier than the last day of publication, to be therein specified. The superintendent shall mail a similar notice to all persons whose names appear as creditors upon the books of the corporation or individual banker. If the superintendent doubts the justice and validity of any claim, he may reject the same, and serve notice of such rejection upon the claimant either by mail or personally. \* \* \* At any time after the expiration of the date fixed for the presentation of claims the superintendent may out of the funds remaining in his hands after the payment of expenses declare one or more dividends, and after the expiration of one year from the first publication of notice to creditors he may declare a final dividend, such dividends to be paid to such persons, and in such amounts, and upon such notice, as may be directed by the supreme court in the judicial district in which the principal office of such corporation or individual banker is located."

(The section is very long. It is believed that the above excerpts comprise what is material to the discussion.)

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